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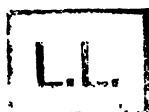
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A. S. Foughton







1953/43

A
D I G E S T
OF THE
D O C T R I N E
O F
B A I L;

I N

CIVIL and CRIMINAL CASES.

Compiled from the various AUTHORITIES, and REPORTS
of Cases adjudged, in the several Courts of Civil and
Criminal Judicature, and calculated for Public Utility.

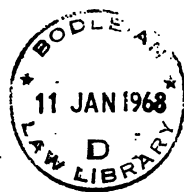
By A. HIGHMORE, Junr.
ATTORNEY AT LAW.

L O N D O N :

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M DCC LXXXIII.



TO THE
PUBLIC;

THE FOLLOWING

WORK,

CALCULATED FOR

GENERAL UTILITY,

IS, WITH GREAT DEFERENCE,

AND RESPECT,

HUMBLY DEDICATED AND
INSCRIBED,

BY

A. H. Junr.

*Bury-Court, St. Mary Axe,
23d January, 1783.*

INTRODUCTION.

BEFORE I proceed to say any thing in general of the following Work, it seems necessary to introduce to the student, an explanation of the principal terms which are used therein.— And of these in order.

I. *The derivation and definition of BAIL.*

II. *The like of MAINPRIZE.*

III. *Of the difference between them.*

IV. *Of the meaning of PLEDGES.*

V. *Of the like of SURETIES.*

I. And first— Of BAIL.

THE best derivation of this word *Bail*, is given by Lord Chief Justice Coke, in his fourth Institute.—*Bail*, says he, is from the *French* noun *Bail*, a guardian, keeper, or gaoler—It is derived by some, from *baller*, *French*, to deliver, because the prisoner is delivered

4 Inst. 178.
Bract. b. 3.
fo. 123.
Register fo.
133. b.
Fleta. b. 1.
c. 26.
Mirror, c. 2.
f. 14.

out of prison ; but it cannot be so derived ; for the entry is, *traditur in* or *per Ballium*, and then the sense (or nonsense) should be, *he is delivered into delivery*. A derivation similar to this we find in the *Termes de Ley*, where it is added that the person bailed is delivered, as it were, into the custody of his bail, to be forthcoming at a certain day, and is therefore said to be "a surety of body for body for an appearance"—And hence the word *pledge* seems naturally to arise, of a meaning very similar to that of Bail ; but of this hereafter.

Dalt. c. 166.
1 New Abr.
205.

Dalton and Bacon define Bail to be, an undertaking of a man's friends before certain persons for that purpose authorized, that he shall appear at a certain day, and answer any legal charge to be exhibited against him ; and this definition is grounded on that of *Bracton*.

It is to be remarked, that Bail is the means of giving liberty to a prisoner, and at the same time securing the extent of the law to punish an offender ; or, to compel satisfaction from a debtor to the party

party injured : therefore, for that the safety of the people should be preserved against the lawless depredations of atrocious offenders, which is of far greater consequence to the well-being of a state, than the private debts or losses of individuals, a variation is made in all criminal cases from those of the common law, wherein Bail is universally allowed, but in criminal cases it is otherwise. See 4 *Black. Com.* 297.

But formerly Bail was a general favour, granted to the subject in most cases, till it was found that increasing corruption growing more and more prevalent, and keeping pace with a rapid swell of population, and influx of inhabitants from other countries, it became necessary to institute some restrictions thereto, of which murder was the first—and surely no one can complain of this as an unjust innovation upon the generous liberality of our ancient law,

In actions of debt, &c. the first process originally was a *summons*, and

Mod. 236.

this was grounded on the principles of *Magna Charta*—that “no person shall be arrested or imprisoned, unless by the judgment of his peers”—if defendant did not appear upon that summons, a *Capias* issued, and he was held to Bail thereon. The reason of Bail, is upon a supposition of law that the defendant flies the judgment of the law; and this supposition arises from his not appearing at first; for if he appeared to the summons, no Bail was required. And this is the reason why it is held to be against law, for any inferior court to issue a *Capias* for the first process: for the liberty of a man is highly valued in the law, and no man ought to be abridged of it, without some default in himself.

But it may not be improper to add, in this place, that so earnestly does the law of *England* regard the public weal, and so justly does it consider the natural equality of mankind, that wherever an injury be committed, there is no difference suffered to exist between peers
and

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and commoners in relation to the reasonableness and necessity of Bail.

II. Of MAINPRIZE.

VERY similar to the nature of Bail, is that of *Mainprize*.—And it is thus defined by *Wood*;—

Mainprize, *Manuceptio*, signifies the taking a man into friendly custody, who might otherwise be committed to prison, on security given for his appearance at a time and place assigned—and is supposed to go at large, without any fear of being taken by his manucaptors, to secure themselves, as in cases of Bail.

Wood's Inst.
610.

He says further, that *manucepti*, are only sureties, that in case the criminal does not appear, (though he was arrested or in prison) they are to forfeit their recognizance.

Ibid. 618.

Bacon confirms this definition in the following words, which he takes from the authorities there cited; *Mainprize* is that the mainpernors are barely his sureties, and cannot imprison him themselves

New Abr.
205.

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selfs to secure his appearance, as his bail may, who are looked upon as his gaolers, to whose custody he is committed.

From hence it seems obvious, that Mainprize arose from the simple honesty of ancient days—when honour ranged through all ranks, of men untainted, and sincere, and when mutual confidence rendered each man's word as binding as his oath or bond in later times: the insinuation here is obvious, that Bail was afterwards established through necessity, and thus mainprize has fallen almost into general disuse!

III. *The difference between BAIL and MAINPRIZE.*

THIS may serve to explain both these terms still further.

Termes de
Ley.
Forest. Law
32, 167.

The difference consists in this—that he that is *mainprized* is always said to be at large, and to go at his own liberty out of ward, after he is put to mainprize, until the day of his appearance,

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ance, by reason of common summons or otherwise. But it is not so, when a man is put to Bail by *four or two men*, by my Lord Chief Justice, in Eyre of the forest until a certain day; for *there* he is always accounted by the law, to be in their ward and custody for the time; and they may, if they will, hold him in ward or in prison till that time, or otherwise at their will; so that *he* who is bailed, shall not be slid by the law to be at large, or at his own liberty.

Sir Edward Coke says further, that every Bail is a Mainprize (for those that are Bail take the person into their hands and custody) but every Mainprize is not Bail, because no man is bailed but he that is arrested or in prison: for he that is not in custody or prison, cannot be delivered out, as before it appeareth. But a man may be mainperned, which never was in prison; and therefore mainprize is more large than bail; See 17 E. 3. fo. 2. 17 Aff. p. 1. 5 E. 3. 21. 32 E. 3. Mainprize 23.

4 Inst. 179.

As

9 H. 4, 3.
 1 H. 6, 6.
 30 E. 3, 20.
 26 Ed. 3, 12.
 11 H. 4, 43.
 12 R. 2.
 Connufance
 37. 8 H. 6.
 30.

In an appeal of felony the plaintiff shall find mainprize, and yet he never was in prison or under custody. And sometimes these mainpernors are called *pledges*—and the mainpernors are to produce the principal *de die in diem* until judgment shall be had.

4 Inst. 180.

And he afterwards adds, there is a manifest diversity between *de die in diem*, and a Bail; for as to him that is mainprized *de die in diem*, no bill can be maintainable against him; otherwise it is against him that is by Bail, *per cursum curiæ*.

Wood's Inst.
 611.

And to this may be subjoined, what is said by Dr. *Wood*.—That mainprize is of a more extensive nature than Bail, for every Bail is a mainpernor, but every mainpernor is not a Bail.

IV. Of PLEDGES.

Mir. c. 4.
 § 9.

PLEDGES and mainpernors are of one signification, (saith the Mirror) notwithstanding that they differ in names; but *pledges*, are these who baile other things

things than the body of men, as in real actions and mixt; mainpernors are, in personal actions, only those who baile the body of a man; safe pledges are those who are sufficient to answer the demand, or the value, and are true men, and freeholders to whom the plaintiff is, and in whose court the plea is brought.

This is further explained by Sir Edward Coke: *Plegii* and *Plegiatio*, are derived of the French word *Pleige*, which signifieth one that undertaketh for another; a surety, *Fidei-Jussor*. Now as every Bail is a mainprize, so every Bail and mainprize is *ex vi termini*, *plegiatio* which see in *Glanville* for the act of suretiship. But in legal understanding, it is taken first for the pledges which the demandant or the plaintiff finds, to prosecute a civil action. And the reason of these were for the answering of the King of the amerciament, if the demandant or plaintiff be barred or nonsuit, &c. so cautious were the founders of our law, that the King should ever be answered of such duties as belong to him :

4 Inst 180.

Glan. 1. 10.
c. 5. Stat. de
Offic. Cor.
4 E. 1. Plegii
de prof.
F.N.B. 31. f.
& 195. h.
17 E. 3. 75.
lib. 8. 61.
& lib. 5. 494.

Braet. lib. 4.
f. 25, 4. a.

him; And for pledges in replevin *de retorno hab.* See *postea*; and 2 H. 6. 15, & Inst. W. 2. C. 2.

V. SURETY comprehendeth all the former;

Regist. F. N.
B. 85. 3 Inst.
cap. fugi-
tives.

AND note, there is a security by the common law, and a surety by statute.

By the common law, as in a writ *de securitate inveniendâ ne exeat regnum*. And there is a surety of the peace, and of the good behaviour *de bono gestu*.

Mirror, c. 1.
f. 3.

And it appears by the Mirror that sureties were always taken in the King's courts before any action could be brought or judgment be receivable thereon.

It is the peculiar privilege, resulting from the *English* law, that the mind reaps in every stage of its progress a firm assurance and conviction, that every ordinance took its rise in an ardent and laudable enthusiasm for the general good, and preservation of the publick freedom; and confirmed by the wisest rules, the domestic as well as national privileges of mankind in society.

The

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The student is further assured, in the high satisfaction of being able to deduce the municipal laws of his country from the first root of justice, the law of God or nature, and the natural doctrines of mutual equity.

But that which still more particularly gains his attention, and wins his devout esteem, is the zealous security of his *personal liberty*, which every where stands foremost in the page of our voluminous code, and is ever deeply impressed upon the mind by the regular tradition of the first great bulwark of the common and statute laws of the realm.

These considerations first suggested to me the following Digest; the utility of laying before the public, at a short and methodical view, the CHIEF DOCTRINE of PERSONAL LIBERTY, seemed as a natural result from my reflections; and a point of learning in which, not only the lawyer, but the subject at large, should be well acquainted.

Warmed

I N T R O D U C T I O N.

Warmed, as I felt myself, with a just zeal, for this sacred basis of the *English* law, I was bold to encourage that zeal, and to pursue my researches—I trust my labours to the candid and discerning, and hope, at least, that they may serve as an inducement or foundation for some more experienced and laborious architect, to raise a fabric more honourable to the legal profession...

P A R T

PART I.
OF
BAIL
IN
CIVIL CASES.
1783.



ANALYSIS

OF THE

FIRST PART.

OF BAIL in CIVIL CASES.

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ANALYSIS, OF THE

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And herein of the SCI. FA. and of pleading thereto.

Audita Querela.

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C. XII. Of BAIL on HABEAS CORPUS.

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- 1. *Of taking the Pledges.*
- 2. *How far they are liable.*

C H A P. I.

O F T H E

A F F I D A V I T to hold to B A I L.

NO persons shall be held to bail for any cause of action under 10 l. in a superior court, and 40 s. in an inferior court (since made 10 l. also) of which affidavit of the cause of action shall be made and filed, and the sum therein specified indorsed on the writ or process; for which indorsed sum the officer shall take bail, and for no more.

12 G. 3. c. 29. s. 12.
2 Burr. 655.

- I. *Of a sufficient*
 - II. *Of an insufficient*
- } *Affidavit.*

i. *What is a sufficient Affidavit to hold to Bail.*

The affidavit must be positive to the debt. Barnes 100, 109.
Stra. 1157, 1209, 1226. 1 Will. 279. 2 Burr. 655. 3 Burr. 1447.

It must say that the defendant is indebted at the date of swearing same. Stra. 1270.

Affidavit that plaintiff has *cause of action* 3 Burr. 1569.
against defendant for 200 l. forfeited by him for so much unsealed silk &c. found

B

in

26 Geo. 2. c. 21. s. 3. in his custody, under a penal act to hold to bail, is positive enough. But any affidavit is unnecessary.

1 Cramp. Pr. 44. Assignee of a bond swore that the obligor was indebted in 90 l. for principal and interest, *as he believed*. Court held it sufficient to hold to bail.

2 Burr. 1032. Affidavit that defendant is indebted, as *he computes* it, was thought sufficient by two judges then only present.

4 Bur. 1995. 1 Cramp. Pr. 44. If executor swears to testator's books, and believes them to contain a true account, and that the debt is still unpaid, this is sufficient.

4 Bur. 1992. & ante, 655, 1032, 1447, 1687, 2126. Affidavit "as appears by a last examination which they believe to be true, and that debt is still due and owing," is sufficient.

Ibid. 2283. And in a subsequent case the court declared it to be a settled point, and cited the former cases, that swearing to belief, "as appears by the bankrupt's books, and as the plaintiff verily believes," was sufficient for an assignee under a commission of bankruptcy, and for an executor or administrator.

Ibid. 1995.

2. *What is an insufficient Affidavit.*

Stra. 1219. Assignee of a bankrupt swearing merely by the books, is insufficient.

Ibid. So also is an executor's affidavit; thus, "as appears by testator's books."

That

AFFIDAVIT to hold to B A I L.

3

That defendant "was indebted in 5000 l. 4 Bur. 2126.
for so much money had and received of de-
ponent, and *for which he has not accounted*"—
the latter words rendered the affidavit *not*
positive, and defendant was discharged on
common bail.

The affidavit had but one stamp, and 5 Bur. 2690.
joined together an action of debt on bond
and an *assumpsit* on promises. It was ob-
jected, this was insufficient in form, and a
fraud on the stamp duty. Plaintiffs claimed
a right of election, and to hold defendant to
special bail on one, if not both actions;—
The court discharged him on common bail,
for the joining two actions together.

Affidavit against partners *jointly*, and not 2 Barnes 58.
severally, is insufficient to hold them *severally*
to bail.

Swearing only *to belief*, though with a re- 2 Bur. 655.
ference *to accounts* sent from abroad where
the debt arose, is insufficient.

"As appears by agreement," is insufficient. 3 Bur. 1447.

"As appears by bill of exchange," is in- 3 Bur. 1687.
sufficient.

Plaintiff made affidavit that defendant Barnes notes.
had seized and detained his ship to his da- in C.B. 78, 79.
mage, and a *capias* was thereon indorsed for
bail without a judge's order.—Rule for com-
mon bail and *superfedeas* was made abso-
lute, for the damages are uncertain, and

plaintiff is not entitled to bail without a judge's order.

Barnes 66.
Wood 58c.

In the *King's Bench* only one affidavit is admitted and filed, in the *Common Pleas* a supplemental affidavit is filed; and after plaintiff's affidavit, defendant made another, 'that he believed the whole debt would appear to be paid', and a common appearance was ordered.

C H A P. II.

Of Persons not held to BAIL.

* * It has been thought convenient to place this head before the other, since the whole of the ensuing part, relates to those who have been held to bail, and the matters incident thereto — which will flow more currently, when these cases of privilege, &c. are cleared away.

In reporting this head, it may be proper to divide it into that,

1. *Of privilege, and persons claiming it.*
2. *Of persons having no privilege, but who, from their particular situation, cannot be held to special bail.*
3. *Wherein SPECIAL BAIL is not required.*

I. Of

SECT. I. *Of Persons having Privilege.*

1. *Of Attornies.*

AN attorney, or other officer whose attendance is required in the court to which he belongs, shall not be held to special bail.

1 New Abr. 181.
1 Mod. 10.
2 Ray. 1567.
2 Stra. 864.
Barn. K. B. 300. 12 Mod. 112, 113, 163, 164, 535, 536.

Again, an attorney cannot be arrested and held to bail for any action whatsoever, unless he put himself in the same state as a trader by *accepting* a bill: but this rule is not now admitted.

4 New Abr. 227.

An attorney, so long as he remains on record, shall have his privilege; and therefore where it was moved, that *L.S.* should put in special bail, being an attorney at large, and having discontinued his practice, court said, attornies at large have the same privilege with the clerks of the court, and are to appear *de die in diem*; and they were not satisfied that he had discontinued his practice.

Ib'd. 219.
Bro. Tit. Attorney 57.
Tit. Bill. 24.
Vent. 1.

But if an attorney absents himself for a year, by the then new rules he loses his privilege. Query the practice now?

2 Lil. Reg. 371.

If an attorney be arrested, and gives a bail bond, he thereby waives his privilege, and must put in special bail.

1 Lil. Abr. 95.

2 Rol. Rep.
115.

But where a person arrested in *B. R.* and immediately afterwards procured himself to be admitted an attorney of *C. B.* and prayed his privilege, it was denied him, because it accrued *pendente lite*.

Sand. 67.
4 New. Abr.
222.

If an attorney be sued in an appeal, he has no privilege, for his own court hath no cognizance of this action.

2 Stra. 1065,
4 New Abr.
230.

It seems dubious whether attornies can be detained in execution—The case was of an attorney who was steward to Lord *Say* and *Sele*; the sheriff discharged him on receipt of his lordship's letter, specifying his stewardship, and the court gave the plaintiff liberty to proceed against the sheriff, but gave him time to make his return, but inclined that the court ought not to insist on the return, because plaintiff could not justify detaining defendant.

2. Officers of the courts.

Brownl. 15.
Goldf. 33.
Ray. 101.
2 Mod. 181.
2 Rol. Abr.
272.
2 Lil. Ab. 369.
1 New Ab. 221.
Scrog's case.

Serjeants at law, attornies, and officers attending the courts, are protected from arrests; the court will discharge them on common bail, and punish the bailiff. See the several judgments in this case.

2 Mod. 181. Long's case.

3. Witnesses

3. *Witnesses and Parties.*

If court give either plaintiff or defendant leave to enquire after evidence, in any cause depending therein, and he be arrested, he shall have privilege—otherwise, if he goes without privilege; so if he be arrested at ten at night of the day he had attended his cause, by any person no ways engaged in the cause, he has no privilege.

2 Röl. Abr.
272.

But this privilege does not extend to an arrest from an inferior court, though defendant shall be coming from the defence of an action in a superior court.

Jenk. 173.

The courts not only protect parties themselves, but all witnesses are protected *eundo et redeundo*; for since they are obliged to appear by the process of the court, they will not suffer any one to be molested whilst paying an obedience to their writ.

Vent. 11.
Mod. 66.

* * This seems to extend from the time of service of the *subpœna* till after the return from the trial.

Also, the courts not only protect the persons of their attendants, but likewise all those things that are necessary for their journey, or the defence of the suit, but not merchandize or goods for sale or traffic.

2 H. 6. c. 4.
Bro Priv. 55.
2 Röl. Ab.
273.

A witness was arrested in his return from the assizes, and in the term following was discharged by motion, on common bail, by the

Trin. 13 Ann.
B. R.
Gilb Ca. 308.
2 Stra. 986.
4 New Abr.
226.

court from which the record issued ; and that, without having the privilege of the court of *Nisi Prius* certified : had the arrest been at the assizes, the judges there might have discharged him ; for privilege given by law is to be prosecuted in such manner as the party may most easily reap the benefit thereof.

* * These are the chief of the cases relating to the courts.

4. *Of those who are privileged in general.*

Dyer 377. a.
pl. 30.
Bro. Priv. 17.
Noy 68.

If process hath issued against a husband, and in coming to defend it, he and his wife are both arrested, the wife shall have privilege as well as the husband ; for they are considered as one person in law, and the wife cannot answer without her husband.

Comb. 29.
King v.
Fielding.

A person coming to give security of the peace is privileged ; otherwise, if to swear same,

Salk 544.

So one came to confess an indictment, court held he had no privilege, *eundo et redeundo*, because there was no process against him.

4 Leon. 81.
2 Rol. Abr.
274.
Lil. Rep. 97.
New Abr. 4.
222.

In indictments, informations, and suits where the king alone is concerned, the officer shall not have privilege ; for it would be unreasonable that they should be protected who offend against the peace. And

“ Publicum bonum, privato est preferendum.”

But

PERSONS not held to BAIL.

9

But in *quædam* actions, which are of a more private or personal nature, defendant ought to have his privilege, as on 23 *Hen. 6.* against an attorney for continuing sheriff longer than a year.

3 *Lev.* 398.
Comb. 319.
Lutw. 193.
Skin. 549.

A peer, or member of parliament, cannot be held to bail, they have privilege.

12 *W. 3. c. 3.*
1 *Ja. 1. c. 13.*

Soldiers are privileged from arrests for any debt under 10*l.* and sailors the like under 20*l.*

Mutiny Act.

Ambassadors, and their attendants, are exempted from arrests and bail.

7 *Ann. c. 12.*
3 *Wilf. 33.*

No person enlisted shall be taken out of the service by any process, other than for some criminal matter, but he may be surrendered by his bail.

29 *G. 2. c. 4.*
f. 14.
1 *Crompt. 53.*
4 *Burr. 339.*
466.

No person lifting himself to serve on board any king's ship shall be held to special bail, unless the affidavit specifies the debt to be more than twenty pounds.

31 *Geo. 2.*
c. 10.

SECT. II. *Of Persons having no Privilege, but who cannot be held to Bail.*

1. *Of Minors.*

An action in case was brought against a minor, for affirming he was of age, and taking up several sums on mortgage thereon; it was moved, that he should put in special bail, but denied; for special bail shall not be given

Sid. 183.

given by virtue of the statute of 13 Car. 2. c. 2. but where it is required by the rules of the court, and the *ac etiam* will compel special bail, unless the cause expressly appears to be for real value, as *debt*, *trover*, &c. but where special bail may arise, as in this case, or other cases, by reason of a special declaration, special bail shall not be required.

2. Of Heirs, Executors, and Administrators.

2 Lev. 204.

1 Danv. Abr. 681.

Wood 580.

In the courts in *London*, and other inferior courts, heirs, executors, and administrators, must put in bail.

* * But this practice has of late been disused, in consequence of a very solemn argument and decision in the Mayor's court, before *Eyre*, Recorder.

1 Danv. 681.

Sid. 63. Lev. 45.

2 Brownl.

293.

Salk. 98.

In the superior courts they cannot be held to bail, except a *devastavit* be suggested; and this can only be on an action of debt on a judgment.

3 B. Com 292.

1 Lil. Abr.

183.

1 Lil. Abr. 183. 3 Bulst. 316.

Nor in actions of account or covenant, unless they be to pay the money.

3 Bulst. 316.

Nor are executors held to bail, although sued by attornies.

Cro. Ja. 352.

Cro. Car. 39.

Lit. Rep. 2, 3.

Wood 580.

If there be a judgment against an executor for the *debt de bonis testatoris*, and for *damages* only *de bonis propriis*, he may bring *error*, and

have

SPECIAL BAIL not required.

11

have a *superfedeas*, without giving sureties, as by 3 *Ja. 1. c. 8.* for though the words of the statute are general, yet it must be intended where judgment is against defendant himself upon his own bond, or where the judgment is general against executors; for it would be unreasonable they should find sureties to pay the whole out of their own estate.

Neither is an heir, executor or administrator, on removal of a cause out of an inferior court, obliged to put in bail.

2 Lev. 204.
Sid. 418.
Lev. 245, 268
2 Jones 82.
"Lit. Rep. 81. Salk. 98.

3. *Securities in a bail bond.*

Are not to be held to bail.

1 Crompt. Pr.
80.

SECT. III. *Cases wherein special Bail is not required.*

In all actions where special bail is not required, it is necessary to file common bail (or enter a common appearance) that it may appear that the court had cognizance of the cause, and also that the defendant has paid due obedience to the writ.

1 New Abr.
213.

Defendant, with leave of the court, may deposit the money in question, in court, instead of putting in bail; and the court will order the plaintiff to waive all other bail; but he must file common bail, for form.

1 Lil. Abr.
173.

In

1 Lil. Ab. 177.
 Ibid. 186.
 Wood 580.
 3 B. Com. 290.
 In cases of conspiracy, common battery, slander, covenant, account, ejectment, trespass, assault, &c. unless ordered by rule of court, on penal statutes, and bonds with collateral conditions or bye laws, no bail is requisite.

1 New Abr. 209.
 3 B. Com. 290.
 But in some of these cases, the court have ordered bail specially, as when it is apparent the damages will exceed 10*l.* &c. on representation and affidavit.

1 Wilf. 120.
 In an action brought on a judgment, where the original sum was not above 10*l.* the court will relieve against special bail.

* * This was an action brought on a judgment by inquiry, pending a writ of error.

1 Sid. 63.
 1 Lev. 260.
 350.
 2 Jo. 97.
 Noy. 8.
 Salk. 100.
 2 Roll. Rep. 53.
 Carth. 519.
 Salk. 99.
 Holt. 127.
 In debt on bond to perform covenants, no bail shall be given, but with respect to the breaches, and the damage done thereby, the measure of that shall be taken from plaintiff's oath.

53.
 Carth. 519.
 Salk. 99.
 Holt. 127.
 In an action on replevin bond, common bail shall be filed.

12 Mod. 320. 380.
 Yelv. 53.
 2 Brownl. 293.
 Comyns 75
 Caf. 48.
 12 Mod. 231.
 And. 71.
 Gilb. C. P. 37.
 On a penal statute defendant cannot be held to bail, for the penalty is in the nature of an amercement for an offence; and therefore until absolute conviction he ought to suffer no inconvenience.

Barnes No. C. P. 80.
 12 Mod. 501.
 Ld. Ray. 579.
 It has once been held, that if plaintiff had been nonpross'd in a former action, and be-

gan again, he should have only common bail, but this has not been abided by. Plaintiff was summoned before a Judge to shew cause why common bail should not be taken, *he did not come*; whereupon a day was given, and unless he then came, common bail was to be allowed; he came before the day, and consented to common bail; and on same day made affidavit of a debt above 10*l.* but the court held it ought not to be received, the bail being regularly filed. Ld. Ray. 324.

If, on examination before a Judge, a good cause of action be not made out, common bail will be ordered. 12 Mod. 526.

If one has several causes of action, each too small for special bail, they cannot be joined for that purpose. Ibid. 527.

By *Holt*, Ch. J. when upon contest for common and special bail, it appears that plaintiff has misconceived his action, here common bail ought to be accepted. Ibid. 579.

In actions for *words*, special bail is not required, unless it be for *slander of title*. Bar. Notes
C. P.

78, 79.
3 B. Com. 290.

In an action for a *malicious prosecution*, on an affidavit, plaintiff had obtained a Judge's order for holding defendant to bail for 200*l.*: defendant being arrested, applied to the Judge, who not being fully satisfied, directed him to apply to the court; in his affidavit he shewed that plaintiff was acquitted. Rep. Pr.
C. B. 148.

quitted on a flaw in the indictment, and not on the merits—a rule was granted to shew cause why common bail should not be entered.

5 Bur. 2661.

Common bail was admitted in an action brought for costs on a judgment of nonsuit, and former * case cited, where common bail was allowed, on the costs encreasing the debt to more than 10 l.—for the addition of costs cannot alter the case as it stood, in respect of the original demand.

Stra. 975.

4 Bur. 2117.

This had been the practice in *C. B.* but not in *B. R.* where all the proceedings are more in favour of liberty than that of the *C. B.*

Lord *Mansfield* said, “ There is reason to lean against requiring bail on the action of debt on judgment, when it could not be required in the original action.—In error brought upon an action of debt on judgment, the action of debt on judgment follows the nature of the original action; and yet bail shall not be required on bringing a writ of error upon the judgment obtained in the action of debt on the first judgment. After a conference with all the Judges, he said he believed the court of *C. B.* would alter their practice in conformity.”—Query if so?

3 Bur. 1545.

* This was so settled in *Biddleston* and *Whytel*.

Sheriffs

SPECIAL BAIL not required.

15

Sheriffs in *Wales* and Counties Palatine, are not to take special bail for a debt under 20. *l.* 11 & 12 W. 3. c. 9.

No writ to hold to special bail must be sued out on a bail bond for defendant's appearance, or for any penalty or forfeiture on a penal statute. 1 Lil. Abr. 179.

Where the action is only for damages, there regularly the party is not to be held to special bail, for there is no certain sum for which bail can be taken; but it is otherwise, if plaintiff makes affidavit of a certain damage, as above cited. 13 Car. 2. ft. 2. c. 2. Barnes No. C. B. 57.

If plaintiff deliver a declaration before bail put in, without the words "conditionally, &c." this is a waiver of the bail, (and also of justification) and defendant may file common bail. Rep. Pr. C. B. 148. Lil. Pr. Reg. 86.

You cannot hold defendant to bail on a judgment or decree in any court *abroad*; for *here* we do not hold to bail on a decree; but this case was on a decree in the court of *Meudon* in *France* for a malicious prosecution—and that we do never *here* construe into a debt. Stra. 1243.

One in execution in custody of the Marshal is not bound to find bail, to another action brought against him; but if he be in the *Fleet*, in execution, and an action be brought against him in *K. B.* he must be removed to the *Marsbalsea*, or put in bail thereto—for when he is in custody, there 1 Lil. Abr. 175.

needs no bail to bring in his person, for he is intended to be always in court, ready to answer the party; but he that is prisoner in the *Fleet*, though he be in prison, the court of *K. B.* can have no certainty to bring in his person to appear there, and therefore he must be committed or put in bail.

1 New Abr.
208.

3 Salk. 58.

1 Lil. Abr.

172.

Cro. El. 5.

Reg. 123.

F. N. B. 106.

2 Roll. Abr.

112.

Dyer 193,

365.

Roll. Rep.

132, 384.

Bull. 140.

pl. 41. 339.

No bail can be taken on executions; for defendant now remains himself to perform the judgment of the court—but if defendant brings an attain, he may have a writ to the Justices, commanding them to let him to mainprise. So if an *audita querela* were founded on a release or record, plaintiff may be bailed; but such bail must be taken in open court—but if on surmise of a matter of fact only, it is otherwise.

Latch. 113. Cro. Jac. 29, 67. Sid. 286. Dyer 285.
pl. 46. 11 H. 6. c. 10. 2 Rol. Abr. 113.

Ja. Dict.

No bail can be admitted on executions, except on an *audita querela* being brought, which is now disused: they move instead, and then must abide the rule of court.

Ray. 475.

3 Mod. 121.

Sid. 210.

If in *homine replegiando*, an *elongatus* is returned, and defendant is taken on a *capias* in *withernam*—though this is no execution, yet defendant shall not be put to special bail, unless he will confess the taking and having the party in custody; but if in an action for a false return of *elongatus* against the sheriff, it is found for plaintiff, he may be bailed.

In

In a first action of debt on a judgment, *Stra.* 782. special bail may be required; but the court said it would be a handle of oppression, if they carried it any further; therefore, no special bail is allowed in a second action on a second judgment; and after defendant has laid two terms in prison, without being charged, he shall be discharged as to the first.

If defendant supercedes for want of being charged in execution, plaintiff shall not have bail in his action on the judgment; for he would not detain defendant when he might. *Ibid.* 1039.

If plaintiff has brought his action wrong, before he can bring another, and hold defendant to bail, he must discontinue the former; else defendant shall be discharged on common bail.—But this rule is waived, in case of defendant's fraudulently putting in bail, who forswear themselves;—here plaintiff is well warranted to sue out a fresh writ, and hold defendant to bail again; and the court justified the plaintiff in so doing, on defendant's motion for common bail. *Stra.* 1208. *Ibid.* 1216.

After a superedeas, defendant gave a fresh note to plaintiff for the old debt, on which note plaintiff brought a fresh action, and held defendant to bail; but the court discharged him on common bail—for it is but a further security, and does not distinguish

the former cause of action, which may be declared upon still.

Stra. 1233.

So, likewise, defendant having been discharged on an insolvent debtor's act, paid plaintiff a part of his debt by instalments, plaintiff sued for the remainder, but court discharged him on common bail; for it was no new consideration, but the same debt.

2 Burr. 737.
and cites the
above case.

And in like manner, a bankrupt, after having obtained his certificate, conscientiously promised payment of an account due before his commission, to a creditor, who had not come in, but the court discharged him on common bail.

C. H. A. P. III.

Who may be held to BAIL.

* * The method hitherto adopted renders it necessary to divide this chapter into the following heads, though it might well have been all considered under the second only.

I. *Of Persons who may be held to BAIL.*

II. *Cases where special BAIL is requisite.*

III. *Cases where BAIL is discretionary.*

SECT. I. *Of Persons who may be held to BAIL.*

* * It may be proper here to premise, that all persons in *England*, except those already
ready

ready mentioned to be exempted, are liable to be arrested and held to bail, in civil causes.

An action was brought against a master of a ship for embezzling goods he had on board, and he was held to special bail; but if it were for negligent keeping, common bail would have sufficed, *per Holt*.

12 Mod.
251.

In debt against executors on a judgment suggesting *a devastavit*.

Salk. 98.

Action against husband and wife, and the wife only arrested, she shall be discharged on a common appearance, for the husband might else continue her in prison; but if both be arrested, she shall not be discharged until bail put in for both; for otherwise a woman might marry a man in gaol, and defraud her creditors.

Barnes, 59.
2 Barnes, 74,
80.
6 Mod. 17,
105.
7 Mod. 10.
63.
Lev. 1, 216.
Sid. 293.
pl. 2.
Sty. 475.

Salk. 115. 2 Keb. 442. pl. 4. 10 Mod. 162. Rep. & Ca. Fr. C. B. 117. 1 Ba. Abr. 210, and the crowd of authorities there recited.

If husband and wife arrested for a debt of the wife's *dum sola*, she shall be discharged, and he shall lie in prison till he puts in bail for both.

Stra. 1272.
1 Lev. 216.

Writ against *baron & feme*, when she is not his wife, yet he must file bail for himself and her; but it shall be an estoppel to him to plead that she is not his wife.

1 Lil. Abr.
225.

SECT. II. *Cases where special BAIL is requisite.*

3 Bl. Com.
290.

Bail is required in all actions for a debt due, and some other cases hereafter mentioned, where the plaintiff has made affidavit thereof to the amount of 10 *l.* and upwards.

Salk. 100.
12 Mod. 295.
And. 70.
2 Stra. 1079.

Special bail was allowed for money won at play, if it was a lawful contract under 100 *l.* but now by stat. this is properly reduced to 10 *l.*

9 Ann c. 14.
Stra. 1079.

So likewise in an action of the loser against the winner.

Ray. 74.

On a dangerous assault and battery, on an affidavit of special damages a judge's order may be procured for allowance of a bailable writ; and

Ibid.
12 Mod. 420.
2 Mod. 215.
1 Sid. 183.

In *scan. mag.* the court, on motion, have ordered special bail.

Cro. Ja. 667.
6 Mod. 14.
2 Stra. 1192.
Ld. Ray. 767.
1 Wilf. 23.
1 Crom. Pr. 47.

Special bail may be required in trover, on making affidavit of the value. And it was held that, without a judge's order, such an affidavit is sufficient to hold to bail, for it is rather an action of property than a *tort*.

4 G. 2. c. 28.
1 New. Abr.
209.
Sid. 276.
Gilb. C. B.
30.

Action for double rent, bail is required.

On affidavit of *great mayhem*, and that he intended to declare in *trespass*, the court ordered

ordered a special *latitat*, with an *ac etiam*, and that so there should be special bail.

Special bail granted for putting an arm out of joint. 1 New Abr. 209.

Mod. 2. See Roll. Abr. 335. pl. 14.

In *debt* on bond for performance of covenants, court will order bail according to the breaches assigned, and the measure of that be taken from plaintiff's oath. Salk. 100. Sid. 63. Lev. 300. Noy 88. 2 Rol. Rep. 53.

In *debt* on bond, tho' defendant says, it was durefs, or on an usurious contract, yet the court held defendant to bail, because they could not judge of the merits until the trial. Salk. 100.

On a bottomree bond for payment of money, *inter alia*, the court inclined to think defendant should give bail. Rep. Pr. C.B. 34.

In an action for fees by an attorney, special bail was requisite, whether there was sufficient cause of bail or not. 1 Lil. Abr. 185.

In an *attachment of privilege* defendant is held to bail for any sum, how small soever; for this being a *capias* in the first process, without summons, does not arise from a suspicion of a *nihil* returned, but arises from a debt due to the officers of the court, by the acts of the court, and therefore another officer ought not to appear without ing a security given for the debt. 1 Sid. 63.

A defendant pleaded the composition act, and that plaintiff's debt, according to the composition he had made with the rest of his creditors, was under 10*l.* and that plaintiff would be bound, tho' a non-subscriber; yet defendant was held to special bail, because, *non constat*, that plaintiff will be bound, for he may deny the absconding, &c. so that this would be to determine the merits of the cause, *viz.* that he was bound by the composition; *aliter*, if plaintiff had subscribed, or had been summoned before a judge, and the matter had received a determination.

Barnes Notes
C. B. 78, 79. In *debt*, in *assumpsit* and *trover*; bail is requisite of course, and slander of title commands bail.

Ibid, 68. Plaintiff failing in proof of execution of a bond was nonsuited, then brought another action thereon, defendant moved for common appearance, but the rule to shew cause was discharged, for that plaintiff, in his affidavit, did not deny the execution of the bond.

2 Will. 381. A declaration in a formerailable action, having been erroneous, the suit was discontinued, and defendant held to bail a second time for same demand, held good, as not meant to harrafs the defendant.

In

In debt on judgment where original debt amounted to more than 10*l*. 1Crom.Pr.47

In an action on a judgment in an inferior court, bail is requisite. 2 Bar. 71.

After a *nonpros* in a first action, defendant may be held to bail in a second, for the same cause. Stra. 439.

Defendant was rendred, and afterwards plaintiff had judgment, and on action of debt on that judgment, court adjudged that the former bail being vacated by the render, defendant might be held to bail again. Rep.Pr.C.B. 34.

After judgment for plaintiff on the issue ; it was arrested for want of bail being entered ; defendant was no party in court, and therefore could not have judgment, it appearing there was no fraud in plaintiff ; but if defendant had appeared at the suit of any other person of the same term, it had been sufficient. Poph. 145.

Action for offences against exporting wool, requires bail by the statute. 11 & 12 W. 3.

In all actions brought for having unsealed wrought silks found in defendant's custody, a *capias* shall issue in the first instance, for the forfeiture of 200*l*. and the defendant be held to sufficient bail thereon. 26 G. 2. c. 21. f. 3, 8.

In a *homine replegiando*, where defendant is in custody on a *capias ad withernam*, the court 1 Lil. Abr. 23.

court admitted him to bail, contrary to the former practice.

Salk. 582. On pleading *non cepit*, defendant may be bailed.

1 Lil. Abr. 176. In all causes of removal by *habeas corpus*, *certiorari*, *writ of privilege*, &c. except as executor or administrator, bail is requisite, and a *caveat* should be entered by the plaintiff with the judges for good bail, by rule of court.

Sect. III. Cases where bail is at the discretion of the court.

Barnes 85, 87. Action for *mesne* profits after recovering in ejectment, special or common bail is in the courts, or a judge's discretion.

Sid. 307. It is so in cases of notorious battery, and
Comb. 57. foul battery against a man and his servants.

Mod. 2. Salk 101. 7 Mod 9. 2 Barnes 47, 55, 58.
4 Ray. 767.

1 Lil. Abr. 177. In all actions where the damages are un-
Barnes Notes certain; as in covenant, or in debt on bond
C. B. 57, 78, to perform covenants, until such covenant
79. be broken, or affidavit made of a certain
damage.

Barnes Notes In trespass and detinue, it is discretionary.
C. B. 78, 79.

4 Bur. 2539. In Mr. *Wilkes's* case, after conviction, if
defendant had been present in court, he
might have been committed, if not present
he

he might have been taken by a *capias*. It is in the discretion of the court to grant bail to a person so circumstanced.

* * The great importance of this case, in all its branches, the variety of matter incident thereto, and the deep knowledge displayed in the several arguments of counsel, and decision of the judges therein; together with the many essential points, so nearly affecting the liberty of the subject, which came under consideration, and were established more firmly by this case, all combine to render it a necessary part of study for every man who wishes to attain a liberal knowledge of the legal profession.

C H A P. IV.

Who may not become BAIL.

ATTORNIES, sheriff's officers, lodgers, and minors.

As to minors, if an infant acknowledges a recognizance, he may avoid it during his minority, (but not after) either by *audita querela*, or writ of error, because of his infancy only; and the way to avoid it must be by inspection, which cannot be till after his full age.

1 Lil. Abr.
185. & seq.

Moor, n. 206.
Yelv. 88.
2 Inst. 673.
Dyer 132.
1 Ander. 25.
Noy 16.
1 Bulst. 187,
188.

On

12Mod. 643.

On an arrest in an inferior court, it is at the officer's peril to take bail who live out of their jurisdiction, for if he do, he has no process to reach them.

Wood 582.

1 Keb. 296.

Law Ev. 77.

1 Lil. Abr.

180.

It may not be improper here to add, that a bail cannot be a witness for the principal; therefore on an affidavit of his being a chief witness, the court may be moved to strike his name out of the bail piece, on defendant's adding and justifying another; but plaintiff may consent to admit his evidence.

C H A P. V.

Of B A I L to the S H E R I F F.

THE foregoing preliminaries being established, the reader is to suppose the defendant liable to be held to bail, and in that situation to be arrested by the sheriff. Therefore it may render his present situation more clear and apparent by dividing this chapter into

I. *The sheriff's duty in taking B A I L.*

II. *Of the bail-bond.*

S E C T. I. *Of the sheriff's duty.*

When defendant is regularly arrested, the sheriff is become liable for the whole debt:
for

for which reason that officer is empowered to ask defendant for a good indemnity until the return of the writ, when he is bound to appear thereto. This indemnity is at the officer's option, because it is at his own peril; and though there have been some instances where the sheriff has taken a bill of exchange, or other personal property, as his security, yet the most usual mode is to propose, by two persons, whom he shall deem responsible, who enter into a bond to the sheriff, in a penalty of double the sum sworn to in the action, with a condition to secure the defendant's appearance at the return of the writ: And the sheriff having taken this bond, remains liable to the plaintiff, until the obligors, or some others in their stead, justify themselves after the return of the writ, in the court from whence the writ issued, within the times limited by the rules of that court.

By this statute the sheriff is bound to take only *fourpence* for the bail-bond.

By the same statute, he is bound to take sufficient bail, if it be tendered to him; and by 12 G. 1. c. 29. he shall take bail for no other sum than such as is sworn to by plaintiff, and indorsed on the writ.

And further, he is bound to take bail in aailable action, when sufficient bail is offered him; otherwise an action on the case

Cro. El. 808.
1 Lil. Abr.
188.

Bl. Com. 3.
290.

23 H. 6. c.
10.

12 G. 1. c.
29.

23 H. 6. c.
10.
2 Sand. 59.
Vent. 55, 85.
Mod. 33.
Salk 99.

lies

Ray 425.
6 Mod. 122.
2 Inst. 186.

lies against him at the suit of the party injured; for it is an offence as well to bail a man not bailable, as to deny a man bail, who ought to be bailed, which the sheriffs formerly did through avarice or malice, to gain of the one, or to grieve the other.

2 Bur. 928.

But, though he is bound to take bail, if sufficient bail is offered to him, yet he cannot justify taking money as a consideration to admit improper bail, or to procure bail; for this he is punishable by the court.

SECT. II. *Of the BAIL-BOND.*

* * Method renders it necessary here to dispense with all the proceedings on the bail bond, because they are subsequent to the return of the writ. At present, as the defendant has only been arrested, and the bail bond given to the sheriff, it may be well to consider merely the statutes relative thereto, and the other matters in order.

1. *Statutes relating to bail-bonds.*
2. *What is a good bail-bond.*
3. *What will vacate a bail-bond.*

1. *Statutes relating to bail bonds.*

23 H. 6. c.
10.

Sheriffs, &c. shall let out of prison all persons by them arrested in any personal action, or by indictment of trespass, upon reasonable

sonable sureties of sufficient persons, having sufficient within the county where such persons be so let to bail or mainprize, to keep their days in such places as the writs, bills or warrants, shall require. And shall not take any obligation for any cause aforesaid, or by any colour of their office, but only to themselves, of any person who shall be in their custody by due course of law, but by the name of their office, and on condition written that said prisoner shall appear at the day and place required by such writ, bill, or warrant. That any obligation in any other form is void; and that he shall take for the same no more than *fourpence*. And the penalty for disobeying this act is treble damages to the party aggrieved, and 10*l.* for every offence; half to the King, and half to the prosecutor.

None who shall be arrested by process out of the King's Bench or Common Pleas, wherein the true cause of action is not expressed, and for which the defendant is bailable by the above statute, * shall be forced to enter into bond with sureties for appearance in any sum exceeding 40*l.* which bond, after appearance by attorney, shall be discharged. This act shall not extend to writs of *cap. utlagatum*, attachment upon *rescous*, *privilege*, or *contempt*.

13 Car. 2.
c. 2.

* N. B.

* N. B. These cases were omitted in citing the above statute, for clearness to avoid an exception, but they are these: Persons committed by condemnation, execution, *cap. utlagat.* or *excommunicat.* surety of the peace by special command of any justice, and vagabonds refusing to serve according to the statute of labourers.

5 Eliz. c. 4.
6 G. 3. c. 26.

2. *What is a good bail-bond.*

Godb. 136.

In a bond taken it was said, "And then and there to answer the plaintiff in a plea of, &c." It was moved to be void, because the statute of 23 H. 6. c. 10. only requires a bond for appearance, but the court held it good, because it only repeated the words of the writ.

2 Lev. 123.

If the bond does not mention the county, and says, "to appear" generally, without saying to what action, it was held good; but perhaps at that period the sheriffs did not find such good cause to be always prepared with printed forms.

Latw. 501.

A bail bond given to the bailiff of a corporation, and not to the king, to appear at the corporation sessions, is good.

Cro.El. 852.

If the sheriff's security have nothing in the county, yet the bond is not void, for the statute doth not make any bonds void, but those which oppress the people; and if he takes

takes bond, with only one security, it is good enough.

* * But as now the bail bonds are printed, and the sheriff has only to fill up the blanks, and never deviates from the words of the writ, and those only to specify the action thus: "to appear before, &c. to answer *A. B.* of a plea of debt," it is become needless to add authorities which seem to have occurred before, or to have given rise to the present concise mode: there are seldom any motions in the courts now to set aside bail bonds for insufficiency of form. But the curious inquirer may see them if he will, as marked in the margin.

Cro. Ja. 286.
2 Lev. 78.
Goldsb. 66.
Ow. 90.
And. 267.
Mo. 430.
2 And. 122.
2 Rol. Rep.
365.

On a *fi. fa.* the sheriff took a bond, "to pay the money at the return of the writ;" held good; for the statute extends only to such bonds, which are made when defendant is in custody. 10 Rep. 99.

If bail bond is taken for a larger sum than that in the writ, this does not invalidate the bond, though the sheriff is reprehensible. Fortesc. 366.

3. *What will vacate a bail-bond.*

Bail bond is void, unless taken and dated before the return of the writ. 1 Will. 223.

If

1 Lil. Abr.
187.
Noy 43.

If a bail bond be dated before, but not sealed and delivered till after the return of the writ, it is void. Plaintiff brought his action on the bond, and the defendant cravedoyer, and pleaded "That it was *primo deliberatum*, on the day after the return, *absque hoc*, it was delivered the day it bears date. A good plea, and judgment for defendant."

3 Lev. 74.

Impossible conditions render a bond single, and if 23 H. 6. c. 10. be pleaded, it renders it void.

1 New Abr.
216.
6 Mod. 309.

If a writ in the name of *A.* and the officer takes a bail-bond to appear ats. *B.* and afterwards there is a *reddidit se*, by the same name, though this be *vitium scriptoris* in not making the bond according to the writ, yet it cannot be amended; for bail must be according to the bail-bond, and not according to the writ.

10 Rep. 99.
&c.
Wood 581.

An obligation with condition to indemnify the sheriff, who let one to bail who was not bailable, is void by the common law.

3 Lev 208.

Defendant taken by an attachment out of *Chancery*, is not bailable; and a bail bond for his appearance was declared to be clearly void by the whole court.

C H A P. VI.

OF PUTTING IN BAIL ABOVE.

- I. *Before whom BAIL is to be put in. And herein of putting in BAIL in a wrong name, and personating BAIL.*
- II. *Of the manner of putting in BAIL, and herein of the recognizance, &c.*
- III. *Of the time limited for putting in bail.*

SECT. I. *Of those before whom BAIL is to be put in.*

O T H E R recognizances, besides those Dyer 220.
on 23 H. 8. may not be acknowledged before any but the judges of the courts at *Westminster*, or by special commissioners.

Bail to a civil action cannot be taken before any but a judge of the court where same Cro. Ja. 54. 95.
 is brought, it being matter of record; but bail for an appearance may be taken by any officer.

A recognizance for money lent may be Hob. 126.
 taken by chief justices at any time in vacation, and tho' it is not a perfect record till entred on the roll, yet when entred, it is a recognizance from the first acknowledgment, and binds persons and lands from that time.

It is enacted, that two judges of *B. R.* 4 & 5 W. & C. B. and Exchequer (whereof the chief jus- M. c. 4.
 D tices,

tices, and chief baron, in their respective courts, to be one) may, by commissions under the seals of the said courts, empower persons (other than common attornies and solicitors) in every county, to take recognizances of bail in causes depending in their several courts. Such justices and baron may make such rules, respectively, for justifying such bail, as to them shall seem meet, by affidavits before the commissioners; so as the cognizors be not compelled to appear in person in the courts to justify themselves, unless they live in *London* or *Westminster*, or within ten miles thereof.

That a judge of assize may take bail in his circuit, which shall be transmitted to a judge of the court, where the action depends, without oath. But on the commissioners taking bail, when it is transmitted there must be an affidavit by some credible person, present at the taking of the bail, of the due taking thereof. And the commissioner is to have but two, but must take the fees for filing and transmitting the bail to a judge, with whom the bail-piece is left.

1 New Abr.
207.

Before this statute, bail was taken, *conditionally* before a judge, as it may, and must be still, if the cognizors live in or within ten miles of *London* or *Westminster*. The commissioners must, by rule of court, keep a
book

book containing entries of the names of the cause, the bail, the person who transmits same, and who makes the affidavit, on which affidavit the judge makes a conditional *allocatur*, and the bail are to stand absolute, unless plaintiff except thereto in twenty days; if he does, they may justify by affidavit taken before the country commissioners.

Of putting in BAIL in a wrong name, and of personating BAIL.

To acknowledge, or procure to be acknowledged, any bail in the name of another person not privy or consenting thereto, is felony without benefit of clergy; but it shall not extend to corruption of blood, or deprivation of dower. 21 Ja.1. c.26.

Any person representing or personating another before the commissioners appointed, or those who have authority to take bail, so as to make them liable to the payment of any sum of money in that suit or action, shall be guilty of felony, but within clergy. 4 & 5 W & M, c. 4. s. 4.

Bail for defendant was put in, in the name of *Parkes*; and all the subsequent proceedings were in the name of *Parkburst*; after the verdict, judgment was arrested; for it does not appear that defendant is in the custody of the marshal. Cro. El. 223.

Salk. 3.
cites post. 47.
3. 235.
Fareley 33,
104.
Cumber. 65,
184.
6 Mod. 80.

V. was arrested as *J. Villars*, Esq; and pretended himself to be Earl of *Buckingham*; and upon motion, the question was, how he should put in bail, so as not to estop him, *et per Cur.* he need not join in the recognizance, and then there is nothing to estop him: in civil actions the defendant is not bound of necessity to join in the recognizance, as in criminal; and even there, upon motion we allowed the Earl of *Banbury*, upon an indictment, not to join in a recognizance, but to find others who gave bail for him by the name of *C. Knowles*, Esq; for their act could not conclude him.

Cro. Car.
146.
Stra. 384.

R. offered himself as bail, affirming he was a subsidy-man, and assessed 4*l.* in the subsidy-book; but afterwards, on further examination, he confessed he was not a subsidy man, and that he had been bail in other actions, and had then sworn he was a subsidy-man. The court committed him to prison, and adjudged him to stand in the pillory, with a paper mentioning the the cause, *viz.* "For false Bail."

Etio. Ja. 256.

Bail was taken on a judgment on a *sci. fa.* and complained to the court, that he was not the man, but personated by another, which he proved by divers witnesses; and it was confessed by defendant, and those who procured the bail. It was ordered that a

Vocat. should be made as to him, of that bail, and of the judgment on the *sci. fa.*

Bail taken before a judge is not within the meaning of 21 *Ja.* 1. c. 26. until it be filed of record; but it is within 4 & 5 *W. & M.* c. 4. s. 4. See *ante*, p. 35.

1 H. H. 696.

1 Burn 152.

Serjeant *Strange* reports a case where the bail to the sheriff went before a judge to become bail above; defendant appeared there, and insisted no bail should be put in. Judge refused to take the bail, and advised the parties to apply to the court, where it was deemed a palpable fraud in defendant, and he was ordered to put in bail, and thereby perform the condition of the bond; which was done; and they surrendered defendant next day.

Stra. 876.

SECT. II. *Of the manner of putting in BAIL; and herein of the recognizance, &c.*

Within four days after the return of the writ, the defendant must appear, by putting in bail above, either the same as were joined in the bail-bond, or others. And this is done, by their attending at the judge's chambers, and entring into the recognizance; thus,

Salk. 98.

6 Mod. 24.

1 New Abr.

214.

In *B. R.* "You do jointly and severally undertake, that if the defendant *C. D.* shall

D 3

be

4 Inst. 174.
5 Rep. 70, 71.

be condemned in this action, at the suit of the plaintiff *A. B.* he shall satisfy the costs and condemnation money, or render himself to the custody of the marshal of the marshal-
sea of this court, or you will pay such costs and condemnation money for him."

In *C. B.* If defendant is not present, and does not enter into the recognizance, then the bail are bound in double the sum sworn to.

3 B. Com.
xix.

"You (naming defendant if present) do acknowledge to owe to the plaintiff 100*l.* you (naming the bail) do severally acknowledge to owe to the plaintiff the sum of 50*l.* apiece, to be levied upon your several goods and chattels, lands and tenements, upon condition that if the defendant be condemned in the said action, he shall pay the condemnation, or render himself a prisoner in the *Fleet* for the same, and if he fail so to do, you do undertake to do it for him."

Crompt. Pr.
1, 57.
Saik. 400.
Wood. 580.

Although the recognizance in the *King's Bench* is general, yet it is reduced to a certainty by the judgment; but the bail are not liable to a larger sum than that sworn to: but in *Common Pleas* they are bound to the plaintiff in a certain sum.

Having acknowledged their assent to this recognizance, the entry is made in the Judge's or Philazer's books, and the attorney must give notice of their names and additions, very full and explicit, to plaintiff,
that

that he may be the better enabled to enquire of their responsibility.

SECT. III. *Of the times limited for putting in BAIL.*

In a country cause, the bail-piece and affidavit annexed must be transmitted to town, and put in before a Judge,

In *K. B.*

	within 40 miles in 8 days	} After return of the writ.
In <i>C. B.</i>	_____ in 10 days	
	If above 40 miles	
In <i>K. B.</i>	_____ 15 days	
In <i>C. B.</i>	_____ 20 days	

N. B. Unless all the Judges are on their circuits, and then as soon as one returns: of which transmission and putting in, notice must be given to plaintiff's attorney.

In the *Common Pleas* the transmission does not make it a good putting in bail, until the bail-piece and affidavit be filed with the proper officer in due time, but the court may be moved for further time.

In a town cause, in *King's Bench*.

In *London* or *Middlesex*, 4 days exclusive. 1 Crom. Pr. 60, 61.

In any other county, 6 days.

In *Common Pleas*, 4 days } inclusive.
Any other county, 8 days }

And if the fourth, sixth, or eighth day falls on a *Sunday*, then all *Monday* is allowed. In the *King's Bench* and *Common*

Loft. 190. *Pleas*, notice of bail must be given within four days after the caption.

1 Crom. 63. Twenty-three days are the utmost that can be allowed for filing bail, but it is better to file it immediately after it be accepted.

1 New Abr. 214.
Rol. Abr. 333.
Hob. 70. In the *K. B.* though bail be taken and entered on the last day of term, and the bill be filed on any day of the same term, this is well enough by the course of this court; though in strictness of law, defendant is answerable, but from the putting in bail, as in *custodia Marefc.* and not before. The like case in trover. Because the bill, whensoever filed, hath relation to the first day of term. And the statute of limitations may be pleaded, if the time be elapsed before the day wherein the bail is filed, though not before the first day of the term wherein the action is brought.

Vent. 135.
Cro. Jac. 384.

1 New Abr. 215.
Cro. Ja. 449. But it seems the constant general practice, that every bail taken before or upon the continuance day, shall be a bail, and filed of the preceding term; and every bail taken after continuance day, shall be a bail, and filed of the subsequent term, and not otherwise; but where any new bail is added to any other, and taken on or before the continuance day, the same will be taken and filed as of that term in which bail was first put in.

So

So if two are arrested on a *latitat*, and one puts in bail of *Michaelmas*, the other of *Hilary* following, the court will allow the former bail to be filed as of the subsequent term: otherwise it would be error to proceed in a joint action, on bail put in of different terms.

1 New Abr.
216.
Latch 182.
Cro. Eliz.
459.
Noy 99.

But bail ought to be put in of that term in which the writ is returnable; that is, before the escoin day of the next term, till then it is irregular to proceed on the bail-bond; but plaintiff, in the mean time, may take an assignment or warrant.

6 Mod. 226.

* * This seems to apply, where the plaintiff could not, by the common rules, get good bail filed before the last day of term.

If in *trover* commenced in *Hilary* term, the conversion is alledged to be on the 3d *February* in same term, and bail is filed the last day of the term; yet this is well enough, for the action shall not be said to be depending till bail is filed.

Vent. 135.

.So likewise, till bail put in, defendant is not in court to plead any thing, nor is plaintiff bound to declare against him.

3 Lev. 343.

* * If defendant therefore does not put in bail, he cannot *nonpros* plaintiff.

The bail may enter into recognizance at different times, and before different Judges; but the first is *de bene esse*, and no complete bail

8 Mod. 188.

is

is given till the last is taken; and so there is no relation to the taking the first, for then the bail and entry is perfect, and not before.

* * But the practice hath since been altered; and the Judge will not take one without the other bail, although the recognizance is joint and several; but the latter part of this case holds in corroboration of the above authorities as to adding bail, of different terms, &c.

CH A P. VII.

OF EXCEPTION AND JUSTIFICATION.

I. *Of Exception.*

PLAINTIFF on receiving notice of the bail put in for the defendant, makes his enquiry relative to the responsibility of the bail; and if he is not satisfied thereof, he may waive their justification, by not entering any exception in the bail-book, or by delivering his declaration peremptorily, or by demanding a plea.

Salk. 98.

6 Mod. 24,
25.

But if he excepts to them, he must mark the same in the bail-book, and give notice thereof to the defendant's attorney within twenty days *after the filing*, else those bail will be allowed.

Mich. 16

Car. 2.

Mich. 8. Ann. If he waives or neglects such notice, on oath made thereof, and affidavit filed by defendant

defendant within four days after the 20th, the bail stand allowed, by rule of court.

And if plaintiff thus accepts the bail, he may take the bail-piece from the Judge's Chambers, and file it for his own expedition, but after twenty days it becomes absolute, and defendant takes it away and files it. Comb. 263.

II. Of Justification.

It is incumbent on the defendant to justify his bail in four days after receiving plaintiff's notice of exception, provided there be so many days left of the term; else they must justify on the first day of next term; and defendant must give notice thereof two days before. 4 Day.

But this head may be divided into

1. *The method of justification, and the matters incident thereto.*

2. *What is a waiver of such justification.*

3. *Of default of justification: and herein of adding bail.*

1. *Of the method of justification, and the matters incident thereto.*

Every justification in court is done by a motion, and the bail are called into court, examined as to their sufficiency, (if opposed) and sworn to be housekeepers, and to be worth double the sum sworn to in the action, after payment of all their debts. Salk. 98.

Bail

Barnes 68.

Bail are not bound to justify till plaintiff gives notice of exception.

Ibid. 64.

Bail gave notice to justify in court on a day certain, before which day they justified at chambers, and surrendered the principal; this was held insufficient, and proceedings on bail-bond allowed.

6 Mod. 24.
25.

It is said, that after exception, there is no limited time to justify or exchange them for better bail, but it must be in a convenient time.

* * But practice has reduced this to a certainty, for defendant cannot exceed the rules of the court for bringing in the body of defendant, and if he justify the same bail he put in, it should be in two days after notice.

Notes in C.B.
220.

Sunday is not a day allowed as one, in a notice to justify; and notice on *Saturday* to justify on *Monday* has been held insufficient.

* * But to obviate this difficulty of time for this notice, it is better to give notice to justify on the second day next after the day on which notice is given.

Barnes 61.

If bail be taken in town, they must justify in town: An affidavit in the country of their sufficiency will not be admitted.

K. B. Trin.
4 W. & M.
C. P. East.
5 W. & M.

The method of justifying a country bail in court, is by reading the affidavit of their justification; of which defendant must give notice

tice, that such affidavit will be produced and read: this by rule of court.

Bail was put in and excepted to, and other bail added. The last bail justified before a Judge, without giving notice to plaintiff's attorney: The first bail justified in court, and the defendant moved to strike off the additional bail, shewing, by affidavit, that he had voluntarily got himself added in the bail-piece, on purpose to have defendant in his power, and surrender her when he thought proper. And the court so ordered. Rep. Pr. C. B. 17.

Landed property in *Jamaica* does not qualify a bail to justify, because it is not liable to the process of this court. This decision was founded on a similar case mentioned by Mr. T. C. jun. 4 Burr. 2526.

After exception, bail must justify, or plaintiff must withdraw his exception, before he can proceed to trial so as to charge them. 12 Mod. 385.

Bail cannot be justified before a judge at his Chambers, except it be by consent, or for necessity in vacation; and in the latter case, they ought to be justified *again* in Term. And upon that, defendant is compelled to accept a declaration, and go to trial at the assizes, if it be an issuable term. 6 Mod. 24. Barnes 115.

2. *What is a waiver of justification.*

If plaintiff delivers a declaration peremptorily to plead, before justification, it is a waiver Rep. Pr. C. B. 155, 156. 1 Lil. Abr. 185.

waiver of such justification, and the court have granted a rule in this case, to shew cause why exception should not be struck off the bail-piece, and bail be allowed.

So likewise if defendant demands a plea before justification, this amounts to an acceptance of the bail. And by taking assignment of bail bond, he waives his right of exception.

1 Crompt. Pr.
79.
10 Co. 99,
100.
Salk. 99.
1 New Abr.
207.

3. *Of default of justification, and herein of adding bail, &c.*

If bail, or either of them, fail in their justification, immediate notice (of four days) of adding and justifying fresh bail must be given; so as not to delay plaintiff of a trial (in which case defendant will be bound to terms) and so as to be within the rule to bring in defendant's body, of which more hereafter; else they are wholly precluded, and the sheriff will be fixed with the debt. But if within the times limited by the rules of the court, defendant put in insufficient bail, to justify, several times, the court have ordered an execution.

Far. 50.

Rich. K. B.
150.

And before the court will permit the added bail to justify, they will order the defendant to pay plaintiff his costs of the former day, when default was first made.

Prac. Reg.
67, 81.

The plaintiff need not except to the added bail, indeed the notice of justification there-
of

of shews this to be needless, for as defendant is bound to perfect his bail in time, he is obliged to give notice of adding and justifying him on a day certain, without waiting for plaintiff's exception.

And if he shall not have time to do this, he may take out a summons before a Judge for that purpose; but he will then be bound to terms, as beforementioned.

Upon adding fresh bail, the former are not discharged of their recognizance; but all do continue sureties for the defendant, unless they move to be exonerated; whereupon a rule is made to strike them off the bail-piece: and they may move at any time after.

1 Cromp. Pr. 72.

1 Will. 337.

So if exception be made to one bail, and another be added, the court will grant leave to strike out the former from bail-piece, at any time before *sci. fa.* and then the proceedings as to him may be stayed after *sci. fa.*

1 Crom. Pr. 66.

After exception, defendant added bail, but did not justify in court in four days, plaintiff proceeded on the bail-bond, and held regular.

Barnes 65.

* * But hitherto the defendant has been supposed not to be compelled by the plaintiff to proceed in his justification by rule: though that has been slightly mentioned, yet it was thought more regular

RULING SHERIFF.

regular to defer it to this head, where that compulsion may be divided into

1. *Ruling the sheriff.*
2. *Proceeding against him.*
3. *Taking an assignment of his bond.*

1. *Of ruling the sheriff.*

* * Not to infringe too far upon the books of practice, it is intended to be brief upon this point, as well as all others relative thereto, the doctrine and theory being chiefly the scope of this work. And to adhere to this plan, and at the same time to observe a just method, it may be proper only to remark

That, if defendant suffers the four days prescribed after the return of the writ to elapse without putting in bail, then, and not till then, it is strictly proper for the plaintiff to take out a side-bar rule, for the sheriff to make a return to the writ, which he must do in four days exclusive. And if at that time no return be made to the writ, or bail be put in, and notice thereof given, plaintiff may have another rule to bring the body of defendant into court, that he may be charged by the plaintiff in the custody of the marshal or warden: And if this rule is not complied with, plaintiff has his *option* of moving the court for an attach-

23 H. 6. c. 10.
12 Mod. 447.
Vent. 85.
1 Mod. 33.
57, 244.

attachment against the sheriff, or of taking an assignment of his bond. But of this in their order.

2. *Of proceeding against the sheriff.*

If an attachment be granted, the sheriff must pay plaintiff his debt and costs, and can only recur on defendant and his bail below, by action on his bond; and if the bond is insufficient to cover him, he is without remedy, for his own neglect.

Sty. 212,
234.
2 Vent. 237.
1 Wilf. 223.

Contra. 3 Leon. 208.

If the persons taken by the sheriff in bail-bond be good men, and pending the suit become insolvent, he shall be excused; for the statute obliges him to take bail, and they were good at the time he took them.

1 Lil. Abr.
511.

But if bail have been put in who did not justify in time, plaintiff cannot move for an attachment, unless he had regularly excepted to the bail. But query.

Loft. 159.

Mr. *Cunningham* (whose labours it may not be improper on this occasion to acknowledge) cites the same case from *Rolle, Croke* and *Noy*; that if the sheriff returns a *cepi corpus* on a mesne process and *parat. habeo*, he shall only be amerced if he does not bring in the body, though he shall be attached if he does not return the writ; the reason is, because the sheriff is bound to bail the party, and therefore if he is mistaken in his sure-

Dist. v. I.
Tit. Bail.
1 Rol. Abr.
807, 808.
Cro. El. 824,
852.
Noy. 39.

ties, he is not to suffer in his liberty; and returning the writ is in his own power; but it may not be in his power to bring in the body which he was obliged to bail. Also, another,

Cro. El. 624. In *case*; plaintiff declared that he sued forth a *lat.* and delivered it to the sheriff to arrest *J. S.* and acquainted him of his cause of action, and that he intended to declare in *debt*, and that the sheriff afterwards arrested him and let him go, *absque aliqua securitate inventa*; and at the day returned *cēpi corpus et parat. habeo, &c.* which was a false return. Defendant pleaded that *J. S.* being arrested put in sureties for his appearance, sufficient persons in that county, and bound in 40*l.* and pleaded the statute, and that by reason thereof he let him go at large; *absque hoc*, that he let him go at large without any security, *prout, &c.* it was adjudged, that the traverse was good, and that the statute commands him to let prisoner go upon bail, and that he is compelled to take bail, but their sufficiency is left to his discretion; and though the return was false *parat. habeo*, when he was at large, yet that is but a contempt to the court, and finable; but the party shall take no advantage of such return. Another,

Noy 43.

In debt on an obligation dated 25th *Sept.* defendant pleads that a *ca. sa.* was awarded against

against *B.* who was taken thereon, the 30th ; and bond was taken for his enlargement. Plaintiff demurred and had judgment, because it appears that the obligation of bail was made before the arrest, and therefore it could not be avoided by 23 *H. 6. c. 10.* but he ought to have pleaded *primo deliberat.* of the arrest, and it was agreed by *Telverton* and *Fenner*, that if a *ca.* be awarded against *B.* and before the arrest, the sheriff takes a bond of him for his enlargement when he shall be arrested, that by special pleading it may be avoided. See *ante* 32. 1 Lil. Abr. 187.

3. *Of taking an assignment of the bail-bond.*

1. * * * If the bail are responsible, it is right for the plaintiff to apply to the sheriff, in cases of default of bail, for an assignment of his bond, rather than to put him to the pain of an attachment: when it becomes the plaintiff's right to sue the bail below thereon, and thereby exonerate the sheriff, on whom plaintiff cannot afterwards recur for any part of his debt and costs. Although this being a proceeding against the bail, and therefore more regularly to be considered under the next chapter, shewing *how far they are liable*, yet it seemed here to come in course, as consequent to a default of bail above, and therefore

it may be well to cite the authorities thereupon.

4 & 5 Ann.

If any person be arrested by writ out of any of the courts at *Westminster*, and sheriff takes bail for defendant's appearance; sheriff, at the request and costs of plaintiff, shall assign to him the bail-bond, or other security taken, by indorsing the same, and attesting it under his seal, in the presence of two or more credible witnesses, which may be done without stamp, provided such assignment be stamped before any action be brought thereon; and if said bail-bond or security be forfeited, plaintiff, after such assignment may sue there-

6 Mod. 122.

on in his own name; and court where such action brought may, by rule, give such relief to plaintiff and defendant in the original action, and to the bail and security, as is agreeable to justice and reason, and such rule shall have the effect of a defeazance to such bail-bond or security.

1 Crom. Pr.
84.

Defendant in the original action may set aside the assignment, by putting in and perfecting bail, on motion or summons.

1 Will. 223.

After taking an assignment, plaintiff cannot rule the sheriff to return the writ

6 Mod. 122.

All the clerks said, they knew the sheriff amerced after an assignment, but *Holt* Ch. J. said, he had known it denied *per reliquos justiciarios*.

The

The sheriff cannot be amerced till he has been served with the rules to return the writ, and bring in the body; and plaintiff ought not regularly to take assignment of bail-bond and proceed thereon till that time; for 3 Salk. 564
if there is no return of a *cepi corpus*, the court will stay proceedings on the bail-bond.

But there are rules of court which do allow the bail-bond to be put in suit, if the arrest be in *London* and *Middlesex*, so early Trin. 6 G. 3; as the fourth day, exclusive after the return, in *B. R.*: and in *C. B.* on the fourth day exclusive of the appearance day.

If in any other county, six days in *B. R.* 11 Mod. 2; and eight days in *C. B.* And all other or contrary proceedings may be set aside with costs.

So, if after bond be given to the sheriff, 8 Mod. 240; and then defendant die before any proceedings be had thereupon, and plaintiff notwithstanding take an assignment, the court will set aside all the proceedings. So also, but with costs, if bail-bond assigned, and Barnes 61, defendant dies before judgment.

But where defendant gave bail to the sheriff, without putting in or justifying bail above; plaintiff staid a year, and then defendant died, on which plaintiff took an assignment. The court held this good, he lived long enough to perfect his bail, and the bail suffer for delays of the principal. Barnes 80.

Stra. 444, 643. In an action brought on the bail-bond, the arrest is not traversable.

1 Bur. 642.

3 Ibid. 223.

4 Ibid. 1923.

3 Wilf. 348.

1 Crom. Pr.

80.

This action must be brought in the court where the bail-bond given, and *venue* laid in the county where same was taken or assignment made, and the defendant therein cannot be held to special bail.

Salk. 97.

If plaintiff sue the bail-bond, he cannot refuse the same persons to be bail to the original action; but if he sues the sheriff, he may refuse to accept those who were sureties to him. So in a cause removed from an inferior court, he must take the same as were bail below, if they be offered, except in *London*, where the officer who takes bail, is liable for their responsibility.

6 Mod. 122.

1 Wilf. 223.

If the bail below become bail above, plaintiff cannot except to them; but by *Holt Ch. J.* if the same that were bail before become bail to the action, and he excepts against them, and they do not justify, he may go on with amercement against the sheriff.

1 Cromp. Pr.

81.

2 Stra. 1262.

Ante, 814.

2. If by neglect defendant has suffered plaintiff to take an assignment of the bond, and is desirous of staying proceedings thereon, he must first justify his bail and then move the court, on affidavit of facts, to shew cause why proceedings should not be stayed; or he may do this by summons; and will be bound to terms; and if plaintiff has lost a trial,

a trial, he will be required to consent that judgment be entred against them on the bail-bond for plaintiff's security; but if the delay is through plaintiff's own neglect, it will be otherwise. As where defendant died before judgment could be obtained in the original action, court staid proceedings on the bond; but if defendant lives long enough, or so long after the arrest, that if he had put in bail in time, plaintiff could have had judgment and execution, court will not stay proceedings on the bail-bond. If this matter be moved, plaintiff must have notice.

Plaintiff may sue the bail-bond, although one bail shall have perfected.

Pr. Reg. C.P.
84.

Barnes 46.
172. Plow. 69.

Cro. El. 672. pl. 31.

Bail-bond was taken, *capias* was returnable on the first return of *Hilary*, defendant obtained time to perfect bail to the last day of that term, taking short notice of trial for the sitting after term; the bail not being perfected, the bond was assigned and put in suit; defendant dying in *April* following, bail applied to stay proceedings, he dying before judgment could be obtained:

Barnes 112.
1 Crom. Pr.
83.

Cur. Plaintiff had not been delayed, if defendant had perfected bail in time, for he might have tried his action after that term,

17 Car. 2. and by 17 Car. 2. might have entred his judgment thereon after defendant's death.

Stra. 1262. Writ returnable in *Easter*, bail bond taken ; plaintiff did not proceed till *October*, then took assignment, and special bail was put in next day. On motion to stay the proceedings, the question was, whether the bail bond should stand as a security ? Defendant insisted *contra*, plaintiff never having delivered declaration conditionally, and thereby not hastened defendant. The court held he was not bound to do so ; defendant was in the first fault, whereby plaintiff lost a trial ; the bail-bond ordered to stand as a security.

1 Lil. Abr.
181.

In all cases where the sheriff sues a bail bond, if defendant cannot plead a *comperuit ad diem*, he must pay costs on staying proceedings on bail-bond : for if he cannot so plead, and thus the bond be forfeited, let the defendant's case be what it will, it will be a favor to the defendant to stay proceedings thereon. But on affidavit and motion, that the cause hath been under an argument, the court will set aside proceedings, and compel plaintiff to proceed in the original action ; but this is now left to the judges by statute.

4 & 5 Ann.

6 Mod. 25.

The bringing principal, interest, and costs, into court, after notice of trial, is not sufficient to stay proceedings on bail-bond ; unless

less it be brought within such time as not to delay or hinder plaintiff from going to trial. *Per cur.*

A motion to stay proceedings, defendant in the original action was arrested on a *testat. ca.* into *Suffolk* out of *London*, and the bail by mistake was filed with the *Filazer* of *London*. Court held proceedings on bail-bond regular, and would not stay them but on payment of costs, and defendant's giving plaintiff judgment on the bond, to stand as a security to plaintiff, and accepting a declaration, and pleading thereto, and taking notice of trial after term; but defendant not consenting, no rule was made.

Cunn. Dist.
V. 1.
Tit. Bail.
Rep. Pr. C. B.
44.

Proceedings on bail-bond staid, plaintiff having declared on the original action, and thereby had concluded himself.

Ibid. 81.

Defendant had surrendered himself by mistake, to the *King's Bench*, instead of the *Fleet*. Bail moved to stay proceedings, but plaintiff had been delayed, and rule dismissed.

Barnes 64.

Defendant surrendered himself in discharge of his bail, after exception, and before justification; and proceedings on bail-bond were staid. But, in a subsequent case, the bail to the sheriff had surrendered defendant into his custody before the return of the writ, and moved to stay proceedings on bail-bond; but the rule was discharged

Barnes 117.

5 Burr. 2683.

with costs; for Lord *Mansfield* said, Nothing can be a performance of the condition of a bail-bond, but putting in bail.

3. * * * Actions against the defendant, and proceedings against the sheriff, have been the subject of this chapter; but as actions on the civil recognizance are incident to the assignment of the bail-bond, they come regularly under notice here.

Hob. 195.
2 Roll. 182.
Sty. 9.

In all actions brought on the recognizance against bail, the *venue* must be laid in the county where the recognizance was taken, in *King's Bench*. In *Common Pleas* it is good both ways.

1 New Abr.
216.
2 Rol. Abr.
600, 897.
Jo. 29.

If the bail are served with process on the recognizance, they have eight days after the return to surrender principal, in their own discharge, else they are fixed.

Winch, 61, 62. Godb. 354. Ray. 14. and the other authorities cited in the New Abridgment.

1 New Abr.
217.
Cro. Ja. 45.
Yelv. 52.

Recognizance was, that *D.* on eight days warning, should appear to any action to be brought against him by *C.* and if condemned, to pay condemnation, &c. In debt on this recognizance, it must be averred, that he gave *D.* eight days warning, for *A.* is bound only to answer the condition in such action, on which eight days warning was given,

given, for that is the foundation of the whole; and there is no reason that *D.* by his voluntary appearance without warning, should prejudice his bail.

Defendant in the original action brought error on that judgment; plaintiff immediately brought debt on the recognizance against the bail, who moved on account of the writ of error to stay proceedings in the action against them. The court were unanimous, that he might proceed to judgment, but must stay execution until the error was determined. Rep.Pr.C.B. 24.

In an action on civil recognizance, the bail pleaded the death of the principal before issuing the writ. *Parker* Ch. J. held it an immaterial plea; for death before issuing the *capias*, is death before the return of it; but if it be found that principal did not die before issuing the *capias*, it is plainly nothing to the purpose; for notwithstanding this, he may die before the return of it; therefore plaintiff must have his judgment: so also, the plea of death of the principal, before the return of *capias* is good; but it is not good, if pleaded generally, without confining it to some time, and specifying the same. 10 Mod.267, 269. See Cunn. Dist. tit. Bail. 10 Mod.306.

C H A P. VIII.

HOW FAR BAIL ARE LIABLE.

Cro. 472,

449.

1 Lil. Abr. 180.

Cro. Ja. 489,
and seq.

See ante, 37.

THERE seems, from the diversity of the early decisions, a doubt of long standing, whether the lands of the bail are liable upon their recognizance, or upon the judgment, as to the first point the recognizance may serve to elucidate. In the *King's Bench* it is general, and silent as to lands; but in the *Common Pleas* it expressly mentions lands and tenements:—the actions brought against the bail on their recognizance, are personal actions; but indeed, if the plaintiff therein has judgment, his execution may be as he chooses, by *elegit*, or *fi. fa.* or *ca. fa.*

1 Lil. Abr.

182.

Pasch. 8 W.

B. R.

If plaintiff file a bill of *Easter*, and bail is not put in till *Trinity*, the bail are nevertheless liable; because the action was then depending; but if the bail be put in of *Easter* term, and the bill be filed of *Trinity* term following, there the bail shall not be liable, because there was no action depending when the bail was put in.

1 Lil. Abr.

181.

1 New Abr.

215.

2 Show. 335.

If plaintiff delivers a declaration in more damages than the recognizance was taken for, they are only liable for their recognizance: this may be collected from a former case cited elsewhere, that if two declarations be delivered, bail are only liable for the damages in that, which agrees with their recognizance. But

But if damages be given for more than the bail were taken for, they are liable for the surplus *pro tanto*. But there is a case in *Salkeld*, where the damages on *trespass*, *assault* and *battery*, far exceeded the *actum*, and the bail were not chargeable; and this judgment was grounded on an express rule of court.

Stra. 922.

Salk. 102.

1 Vent. 44.

1 Sid. 183,

258.

S. C. Mod.

Cases 266.

1 Mod. 8.

1 Sid. 425.

2 Keb. 552.

On this head *Lilly* suggests the following query—Whether the bail ought not to bring the amount of their recognizance into court?

1 Lil. Abr.

181, 188.

1 New Abr.

215.

If bail be entred thus, viz. *subpœna executionis in adjudicatione*, where it ought to have been *subpœna condemnationis*, yet it shall stand for the judgment as execution; adjudged upon a writ of error, and ordered to be amended and made *subpœna executionis judicii*, as well as for the execution.

1 New Abr.

215.

Cro. Ja. 272.

Bail cannot be taken for a part, viz. the execution and not the judgment, no more than for part of the debt.

Bulst. 107.

A bail cannot enter up judgment and issue execution against the principal, on a warrant of attorney given to indemnify him, till some process has issued on the bail-bond or otherwise, whereby he has received injury.

11 Mod. 2.

If

Br. Proced.
pl. 13. cites
31 H. 8.

If a man arrested in a franchise, sues a writ of privilege, and removes the body and the cause, and after does not come to prove his cause of privilege, plaintiff in the franchise may have *procedendo*, and therefore it seems that there the first sureties remain. *Contra*, if he had been dismissed by allowance of the privilege, for then they are discharged: for when they remove the body and the cause, they do not remove any sureties, and there is not any record against them; and the privilege being allowed, they are discharged; *contra* when privilege is not allowed, for then privilege and cause was always remaining with those of the franchise.

Yelv. 120.

So, bail was given in an inferior court, and on *habeas corpus*, bail taken in *King's Bench*: afterwards a *procedendo* was awarded, and judgment against the principal in the inferior court, which was affirmed on a writ of error; and on a *scire facias* against bail below, it was adjudged, that they were discharged, although the bail in *K. B.* was not filed, for that could not be till the term: but it was agreed by all, that if the *procedendo* had not been delivered to the sheriff before the taking the bail above, it would have been a *superfedeas* to the first writ, and the bail in the inferior court must have stood.

If

If a writ of error be brought, and former judgment reversed thereon, the original bail are liable, for when the first judgment is reversed, it is as if that judgment had never been, and as if at the first the principal had been condemned in the inferior court. Cro. Ja. 94.

In case of bailing a prisoner, the constant rule in *B. R.* is, that where the return of the sheriff is to be at a day certain, and the prisoner is bailed before the return, the bail then to be taken ought to be in a sum of money, and not body for body; the reason is, because, before the return he is not present in court; but if he is bailed, after the day of the return, and when he is present in court, the bail is then to be *de die in diem*, and in this case, the bail should be taken body for body, because the prisoner is then present in court. Bull. 45. Bailing a Prisoner.

Plaintiff recovered in debt in *B. R.* and on awarding a *ca. sa.* defendant died; the question was, if an action of debt lay against his bail; the executor having nothing, a *scire facias* doth not lie against bail; and in *C. B.* court was divided. Death of Principal,

Principal died after return of *ca. sa.* and before second *scire facias*, the bail were held liable, for it was their omission that they did not surrender him, he being alive at the return of the *ca. sa.* Ray. 1452.

The

Mod. 16.

The course of the court is, that bail be taken for no more than the sum in the writ, but yet the bail stands for all actions at the suit of the same plaintiff; but it is otherwise if a stranger bring an action against him.

4 Burr. 2503.

Discontinu-
ance.

After bail had justified, plaintiff, doubting of their sufficiency, obtained a side-bar rule to *discontinue*, without disclosing that bail had justified; and then made fresh affidavit, and laid the action in another county, and insisted that Clerk of the Rules should mark the affidavit "that such a debt was sworn to", in order to charge defendant in custody of the marshall; as, this being the last day of term, defendant could not justify bail in the new action till next term, and so must remain in custody till then. The court said he ought to have asked leave to charge defendant in custody, disclosing the whole of the case, and, after some demur, discharged the side-bar rule; so that the bail to the former action, who had justified, still remained liable to their recognizance.

2 Stra. 1216.

Mr. *Priddle* was the attorney concerned, and cited, in his justification, a case where defendant was holden to bail in the second action; though he was arrested upon it, before the former was discontinued.

2 Crompt. Pr.
72.

Where plaintiff sues out an *elegit* or *fi. fa.* against defendant, he releases the bail: But *ca. fa.* being personal, and requiring defendant

ant to surrender himself, is the only writ in execution against defendant which affects his bail; and if he is not surrendered at the return of the writ, bail are liable on their recognizance. And this writ must be returned by the sheriff "*non est invent.*" before bail are suable. But if principal be taken thereon, plaintiff cannot sue bail at all: *so e contra*, he cannot take defendant, after taking the bail.

Executions.

Ja. Diſt.
Tit. Bail.
Barnes 66.

But if one of the bail be in execution, plaintiff may take the other.

2 Cro. 220.
2 Bulſt. 68.

In the *Common Pleas*, plaintiff may levy part of debt on defendant's goods, and remainder on those of the bail; but if he first take defendant's body in execution, he cannot touch the bail or their goods.

Inf. Ley
91. 220.

The judgment on *sci. fa.* being several, the execution may be several; and a *ca. fa.* sued out against one of the bail only is good, although the second *scire facias* is joint; and as the recognizance is taken separately, they may be separately sued.

1 Lev. 226.
Sid. 33.
2 Sid. 12.
Barn. 74.
Prac. Reg.
C. B. 88.

If plaintiff sue principal by *capias*, and bail by *sci. fa.* and have judgment on each, this is such a severalty, that he cannot have execution on either of those judgments against the goods of principal and bail, for there must be several executions on several judgments.

Sty. 290.

Noy 18.

Bail in the original action are not liable for the costs affect in the *Exchequer* on a writ of error brought on the judgment.

C H A P. IX.

HOW THE BAIL ARE DISCHARGED.

* * Perhaps it should seem that this subject should have been postponed to the close of this first part of the digest; but as we have hitherto proceeded in the same track which every cause in practice follows, so it was thought proper to finish what related to the defendant himself, before we entred upon any proceedings against the bail; and in this case, having found how far they stand liable, it may be well to see, how they may be *discharged*. And this by the following method.

SECT. I. *General causes of DISCHARGE.*

SECT. II. *Of SURRENDERS.*

SECT. III. *Of the EXONERATUR.*

SECT. I. *General Causes of DISCHARGE.*

1 Lil. Abr.
186.

Ibid. 177.
Cro. Ja. 620.
Salk. 98.
Comb. 295.

A Discharge of the principal, is in law a discharge of his bail.

If plaintiff does not declare in two terms, defendant may nonsuit him, and then the bail

bail are discharged (and likewise the principal, if in custody on common bail).

On an original sued in *London*, and bail put in, plaintiff declares in another county, such declaration is good against defendant, but his bail are discharged; and not liable to *sci. fa.* But Mr. *Bacon's* subsequent authority differs from *Levinz*; for he makes the bail liable to the damages on the declaration. Lev. 235, 245.
1 New Abr. 215.

A bail-bond was entered into to appear the first return of *Michaelmas*; defendant died on the 10th of *November*, and on the 12th, bond was assigned and sued. On motion, the suit was stayed on payment of costs; for plaintiff was at no delay by defendant's not appearing the first day; for if he had, he could not try his cause that term; so that defendant dying within that term, the bail were discharged. 1 Lil. Abr. 254.

If a person makes his escape out of prison, and is taken, and bailed, the bail shall be discharged on a writ to the sheriff, commanding him to keep the prisoner in discharge of his bail. 1 Ann. c. 6.

On removal of a cause in *case* from an inferior court, and bail put in; and afterwards judgment be confessed in *debt*, hereby the bail are discharged; for this is not the same action to which they became bail. 1 Lil. Abr. 182.

Freem. 338.
12 Mod. 601.

If defendant die before the return of *ca. fa.* the bail are discharged, and may plead this to a *sci. fa.* brought against them. Not so, if he dies after the return of *ca. fa.* and before return of *sci. fa.*; for *sci. fa.* is as it were a writ of grace. Their recognizance is forfeited on *ca. fa.* returned, and the court will only discharge the bail, after such return, upon an absolute render of defendant. But as the courts always lean to serve bail, the subsequent practice has extended this "grace" to the return of a second *sci. fa.*

* * But there are several cases on this point which will be here stated, though some of them seem to bear a totally opposite doctrine, and therefore they are mentioned here very shortly, in order to induce the student to look into the authorities themselves.

1 Roll. Abr.
336.

2 Will. 67.
1 Mod. 31.

2 Ray. 145.

2 Stra. 717.

2 Cramp. Pr.

81. 1 Lil. Abr. 177.

If the principal die *after* return of the *ca. fa.* and before suing out *sci. fa.* the bail are fixed; but not so, if he dies *before* the return of the *ca. fa.* and may plead this in discharge of themselves to a *sci. fa.*

Noy 83.

But Noy says, That by the death of principal, bail are discharged. So by *J. Jones*, if he had died before the return of the first *sci. fa.* So in *Hobbs* and *Todcastle's* case. That death *after* a *ca. fa.* against principal, and be-

fore *sci. fa.* against bail is a discharge: and so all the clerks agreed. So also, defendant died after return of *ca. fa.* but before the return was filed; the court stayed proceedings in favour of bail: and further, recites two authorities. If defendant die between the return of *ca. fa.* and *sci. fa.* the bail are liable, for they might have rendered him on *ca. fa.*; yet had he lived, they might have rendered him any time before second *sci. fa.* but this *ex gratia curiæ*.

1 Lil. Abr.
183.

Cro. Ja. 105.
Hut. 47.

But on the other hand, the writ was returnable, and defendant died a day or two after, while it yet remained in the sheriff's office, not *actually* returned. And here the motion to stay *sci. fa.* was disallowed.

2 Crompt. Pr.
82.
See 1 Nelf.
328.

Formerly, if defendant were alive at the time *sci. fa.* was brought, it was not material, so as he was living at the return of the *ca. fa.*; but the practice since has been, that as the bail have till the return of the second *sci. fa.* to render—he must be in existence till that time, else they have not that privilege: so if he dies before, they are discharged.

Cro. Ja.
165.
2 Keb. 127.

Plaintiff by collusion with defendant would charge the bail, and discharge the principal, on oath; the practice being very flagrant, and both principal and bail being in execution, the bail first, and afterwards the principal were discharged by the court.

1 Bulst. 43.
Cuna. Dict.

SECT. II. Of SURRENDERS.

1. *By defendant himself.*2. *By his BAIL.*1. *Of surrenders by defendant himself, and the several matters incident thereunto.*

Cro. Ja. 98. The render must be in the court where the judgment is.

Defendant may surrender himself in any stage of the cause.

Barnes 46. The surrender cannot be made till both the
172. bail are compleated, and plaintiff may sue
Pr. Reg. C.P. the bail-bond although one only shall have
84. Plow 69. perfected. But where defendant having an
Cro. El. 672. order for time to put in and perfect bail, put
pl. 31. in bail and surrendered himself without first
perfecting them, held regular.

3 Bulst. 192. If there be more than one defendant, and
1 Lil. Abr. only one renders himself, this will not dis-
187. charge the bail.
2 Keb. 766,

776. If defendant be condemned in debt, will
Cro. El. 22. render himself to the court, and pray that
Lev. 58. the court would record his render, and that
his sureties may be discharged, plaintiff will
be required to make his election of execu-
tion against his body or goods, and by this
offer of the defendant, bail are discharged.

Comb. 263. When defendant surrenders, the bail-piece,
2 Lil. Abr. should be marked and discharged, otherwise
451. plaintiff may proceed against bail.

If

If defendant renders himself after judgment, it is at the plaintiff's option whether he will yet have execution against him or his bail: but if he takes the bail, though he shall not receive full satisfaction, yet he can never recur to the principal. . Cro. Ja. 320.

2. Of Surrenders by the BAIL.

Bail may seize defendant any where, or at any time, going to or returning from any court of justice.

They cannot render him before the return of the writ; and this would be a bad plea in bar to an action on the recognizance. But query, they can justify detaining him in custody till that time, and then surrender him. But this custody cannot be that of the same sheriff, for he is already indemnified for his liberty. And, 1 Cromp. Pr. 75.
Salk. 101.

They may surrender him without perfecting, at any time before sheriff is ruled; but not after, if they have been excepted to, then they must justify and be perfected before surrender. 1 Crom. 75.

Bail excepted to, who cannot justify, are no bail, and cannot surrender, but fresh bail may surrender before exception. Reg. East.
10 G. 3. C.B.

Bail surrendered principal before a judge, and *reddidit se* entred in his book, but no notice given to plaintiff's attorney to discharge bail-piece, held good. 1 Cromp. 75.

1 Crompt. 77.

The *reddidit se* or writ of *ba. cor.* with return, must remain with the secondary, if defendant was surrendered in court, or with judge's clerk, if before a judge, to be filed; and a copy or note only of such surrender or return of *ba. cor.* under the hand of such judge or secondary, shall be delivered to the marshal or warden at the time of commitment; and the *committitur* must be entred in two terms, and defendant charged in execution (if on a judgment) or else he will be discharged on common bail.

Lil. Abr. 431.

Barnes 108.

Defendant was to be surrendered; but the bail-piece was lost, the court gave leave to put in bail *de novo* before they could surrender him.

* * It is a hard case, to surrender a man who has property to secure his bail; it may therefore be well to ask the bail, if they will take a security for the debt, in consideration of his liberty.

If defendant is rendered, he must go into custody although he shall have bail ready to supply their place; for it is not like bail to the sheriff, who may take any for his own security; but he is now in custody of the court, and plaintiff has a right to due notice of the fresh bail that he may satisfy himself of their responsibility; for it is a rule in law, that altho' defendant is to be allowed his

his reasonable liberty, yet plaintiff must not be injured, by having any bail of defendant's choosing, palmed upon him.

If the bail are sued on their recognizance in *B. R.* they have eight days after the return of the process to surrender defendant in their own discharge; but in *C. B.* it is on or before the return; and if sued by *sci. fa.*—any time before the return of the second *sci. fa.*

Tr. 1 Ann.
Mich. 1654.
1 Rol. Ab.
600, 897.
Winch. 61.
Godb. 354.
Ray. 14.
2 Show. 77.
Salk. 98.

If there be three bail, and one renders defendant, who only enters an *exoneretur* for himself; it was held, that this rendering was a discharge *in posse* to all, but not complete and actual till *exoneretur* for all be entered.

If the defendant be rendered and the bail-piece be not discharged, it was held good, that plaintiff went on to two *nibils*, and a *sci. fa.* against bail; but in a subsequent case, the judgment was set aside, but with costs.

1 Lil. Abr.
187.

Husband and wife were arrested for a debt *dum sola*, and bail put in for both, who surrendered them; the wife was detained on *mesne process*, not in execution, and moved to be discharged. If she had been arrested before her husband, she would have been discharged on a common appearance; after he is arrested, she cannot be taken into custody again; discharged by *superfedeas*.

Barnes 96.
1 Crom. 77.

Plaintiff brought an action in *C. B.* against defendant, on recognizance of bail, but defendant

Stra. 915.

fendant appearing to be an attorney of *B. R.* plaintiff desisted, since which defendant surrendered principal; and yet plaintiff filed a bill on the first day of next term. On motion to stay proceedings against bail, this was held a good render, for plaintiff should have begun right at first; thus if plaintiff be wrong in his action, yet bail shall not be precluded from surrendering principal; but then he certainly can take no advantage of plaintiff's error.

Stra. 641.

If a King's debtor be in custody, his bail in civil actions being found to be so in just actions, may have *hab. cor.* and surrender him to the marshal or warden.

Stra. 1217.
Convict.

So likewise, *Vergen* was a convict, and ordered for transportation, his bail in a civil action brought him up by *ba. cor.* to surrender him; but it was objected that the court could not take him out of the custody of the sheriff: to this it was answered, that upon the return of the writ, he was to be considered as the prisoner of the court, and they might remand him to *Newgate*; the bail were therefore ordered to surrender him; and he was immediately remanded.

4 *Burr.* 2034.

But if defendant is actually shipped on board for transportation, and ship ready to sail, it is too late for his bail to surrender, for they cannot have *ba. cor.*; besides, the incon-

convenience of such a practice is very apparent.

Bail may surrender a soldier, or impressed man, by bringing him up, if already in custody, by *ba. cor*; and the court will order them to deliver him to the marshal in discharge of themselves, and that the marshal immediately deliver him to the keeper of the *Sevoy*; and, if he be not in custody at all, his bail may surrender him in their own discharge, and he will be committed to the marshal, but instantly set at large; for no person lifted, according to the statute, shall be taken out of his Majesty's service by any process, other than for some criminal matter.

1 Burr. 339.
Soldier, &c.

29 G. 2. c. 4.
s. 14.

Bail in an inferior court, may render principal pending a writ of error brought on the judgment there-given; but such render must be upon record, and so pleaded.

1 Lil. Abr.
183.
Error.

If defendant, pending a writ of error, is rendered by his bail, or renders himself, tho' the recoveror cannot pray him in execution, nor can the court put him in execution, because the error is a *superfedeas* thereto; yet this is a good discharge to the bail; for the marshal ought to keep him in prison as a pledge, till the judgment be affirmed, or disaffirmed; as he does on *mesne process* for want of bail.

1 Cunn. Dist.
1 Rol. Abr.
334, 335,
Moor 853.
Cro. Jac. 402.
1 Bulst. 191.
Rol. Rep. 392.
Ray. 130.
3 Mod. 87.

See 1 New Abr. 218. and a crowd of authorities there cited.

If

1 Burr. 340.

If the bail apply within the time allowed for surrendering principal, after a writ of error brought by him, they must pay the money, or surrender him in four days after error be affirmed. But if they do not apply within that time, then they shall only have four days to pay the money, but no alternative of a surrender.

Hob. 116.

But there is an early case, where defendant, after having brought a writ of error, desired to surrender in discharge of his bail, which the court refused pending the error.

Stra. 872.

So, pending the error, bail moved out of time for leave to surrender defendant, court staid execution against them till after affirmance.

Stra. 419.

Stra. 781,

and ante Stra.

443.

A *ca. fa.* was returned, *non est invent.* defendant sued out error, and two days after, plaintiff issued *sci. fa.* against bail, pending the error; defendant might have absconded, and if plaintiff had got over the return of *sci. fa.* before surrender, he would have been fixed: on motion to stay first *sci. fa.* court gave leave, but bound bail to surrender defendant if judgment affirmed, or give judgment on the *sci. fa.*

Note, It does not appear how the bail were mended by the motion, save by delay; and it shews also, in agreement with the other authorities, that error does not always operate to supersede execution. And

the

the court afterwards made a rule to the same purport, as we have already reported in the last preceding page from 1 Burr. 340.—to which the student is desired to refer for more particular information.

And there is a subsequent restraint laid on writs of error in these cases, cited by the same authorities: that if plaintiff get execution on the second *sci. fa.* against bail, pending error, the court will not set it aside.

On a second *sci. fa.* bail brought in defendant, and prayed he might be in execution: but the court ruled, that if *ca. fa.* be awarded, returnable the next term, whereon *nihil* returned, principal shall never afterwards render himself in their discharge; but if it be returnable from day to day, then the body may be brought in upon the first *sci. fa.* and there must be fifteen days between the *teste* and return of the *sci. fa.* so that they may have reasonable time to seek the principal.

If action of debt on recognizance in original cause be brought, pending error on judgment, court will stay proceedings in such action, without the bail giving judgment; for by the judgment they would be barred from surrendering.

If bail surrender principal at or before the return of the second *sci. fa.* so as it be before the rising of the court, on that day, it is good;

Ibid. 1270.

Stra. 526.

Cro. El. 738.

Prac. Reg.
C. B. 83.

1 Will. 270.
1 Keb. 899.

1 Salk. 101.
Ja. Diſ.

good; and they ſhall then be diſcharged, although there be not immediate notice thereof: and if, through want of notice, he is at further charge againſt the bail, that ſhall not vitiate the ſurrender, but the bail ſhall not be delivered till they pay ſuch charges. If they ſurrender him after return of *ca.* to a tipſtaff, and he eſcape, this is not a good ſurrender, and the bail are liable; if before the return, it is otherwiſe; for one is an indulgence, the other is a right.

Mod. Ca.
238.

Burr. 1360.

The ſuing out a *ca. ſa.* and leaving it in the office, is a kind of notice to the bail, that plaintiff would proceed againſt the perſon of defendant, and the bail are bound to ſearch the office for it; for if they have not time to ſurrender defendant before the riſing of the court, on the laſt day allowed, they cannot plead their ſhort notice from the ſheriff, of a *ca. ſa.*; and this is a matter which the court will not conſider of: and unleſs the bail ſurrender the principal before that time, they will remain liable.

4 Burr. 2134.

But if the action be by original, the bail are in time to ſurrender defendant, on the *quarto die poſt, ſedente curia.* In this caſe they ſurrendered him within the appearance day, but after the return; and the ſame practice holds in *C. B.*

SECT. III. OF THE EXONERETUR.

* * This is an entry on the bail-piece in all cases of surrender, or even compromise of aailable action, essentially necessary for the future safety of the bail; and may be done at the time of surrender, or at any time after that, or after a compromise, by summons before a judge. Notice must be given thereof, if done at the time of surrender, or without a summons, and the bail-piece be discharged together, else the plaintiff is right in proceeding even to a *sci. fa.* and the bail be put to their *audita querela*.

Salk. 101.

If there are three several actions, and three several bails put in, and defendant surrenders, all the three bails must enter *exoneretur*.

Salk. 98.
1 New Abr.
218.

An *exoneretur* was ordered, but omitted to be entred; plaintiff was apprised of the surrender, but not his attorney, who sued out *sci. fa.* Court held them irregular, but gave costs, the attorney not having done it to oppress; because plaintiff himself was apprised of it, and also because the *sci. fa.* was not sued out in *Middlesex*, where the bail-piece remained after surrender.

1 Bur. 409.

4 Burr. 2107. One of the bail was excepted to, and did never justify, and other bail added in his place: plaintiff went on to two *sci. fas*, and two *nibils* returned thereon; when this bail moved to have his name struck out of the bail-piece. The court gave leave for an *exoneretur* to be entered as to him, *nunc pro tunc*, and a case was cited of bail in error, where *D.* was excepted to; *L.* was added; *L.* became insufficient; whereupon defendant in error, on affirmance of judgment, proceeded against *D.* and they moved to strike his name out of the recognizance.

1 Leon. 59.
Hob. 210.

If defendant render in discharge of his bail, and plaintiff refuse to have execution of his body, the bail are discharged, and an *exoneretur* must be entered.

C H A P. X.

OF THE SCIRE FACIAS, AND THE MATTERS INCIDENT THERETO.

* * Although it is the intent of this work to observe a close and regular method, yet in some other cases, as in this, that method has been necessarily divided. It appeared proper, at first, to collect all matters of the same title together; but

all matters of the same title together; but the subjects have sometimes dispersed them. So the cases in *scire fa. in error* are obliged to be referred to the next article, this chapter treating only of *sci. fa.* on the first judgment. Thus, in order,

SECT. I. *Of suing out the sci. fa. judgment thereon, &c.*

SECT. II. *Of the pleadings thereto.*

SECT. III. *Of execution on the judgment on sci. fa.*

SECT. I. * * * The writ of *sci. fa.* issues after judgment *, and is a suit against the defendant's bail, he not having been taken in execution on a *ca. fa.* which must be sued out and returned ineffectual, before this writ can issue; for the bail are not to suffer till it is absolutely necessary. And even in the present exigency, sufficient time must be allowed them, which are called warnings, that they may yet have every opportunity of taking the defendant, viz. the return of the *ca. fa.* must first be made, then a *scire fa.* must be sued out and returned, and two *nibils* or defaults returned

1 Lev. 225.
Att. Pr. 343.

1 Crom. 87.

* He that sueth forth a *sci. fa.* in Chancery, to defeat an execution on a statute staple, shall find surety to prosecute with effect. Law Obl. 261.

G

there-

Yelv. 112.
Cro. Ja. 59.
633.

Lil. Pr. Reg.
249.

thereon, before a second *sci. fa.* can issue against them. And note, the times of the *Teste* and returns of all these writs tend to favour the bail, and to give them opportunity of securing defendant; for the *ca. fa.* must have seven days between *teste* and return, and be delivered to the sheriff *four days* (of which *Sunday* is not one) before the return, and two *nibils* must be returned thereon before the first *sci. fa.* can issue against the bail, for defendant cannot render himself but to the sheriff in his own county.

2 Crom. 80.
Lil. 471,
1 Roll. Abr.
250.
Ray. 156.
1 Lil. Abr.
182.
1 Wilf. 270.
1 New Abr.
216.

And although it has come to this length, yet the bail when sued by a second *sci. fa.* still have liberty to surrender the defendant in their own discharge on the return day thereof, before the rising of the court, in court, and not before a Judge; and on motion, the court will stay the proceedings; and on notice of the render to the plaintiff, the bail will be discharged.

Stra. 1165.

There is still another advantage, that a *sci. fa.* is never amendable.

Roll. Abr.
308, 333.
Moor. 432.
Cro. El. 597.
Goldf. 134.
1 New Abr.
216.

It has already been mentioned in its proper place, that the bail may be sued in debt on their recognizance, but they are only to be served with process; they must not be held to bail; and they have during the *otto die post* to appear, or bring in defendant.

But the plaintiff seems to have his option of this action, or a *sci. fa.* And this writ recites their recognizance, and that defendant has not satisfied the judgment, whereby they remain liable on that recognizance, which is therefore become forfeit.

Mr. Bacon adds, A *sci. fa.* is the usual and proper remedy against the bail; when judgment has been obtained against the principal, and no satisfaction made by him; and this is founded on a record, to wit, the act of the court in admitting the party to bail, and the judgment against him: but it must appear that the party himself hath not satisfied the judgment; and hence it hath been a settled rule, that there must be a *capias* returned against the principal, before the *sci. fa.* is to issue against the bail, and that it must be awarded within the year, else not till a *stri. fa.* against the principal; but it is not necessary to recite it in the *sci. fa.*

When the plaintiff sues the bail, he can never recur to defendant; for his process against bail is for his own advantage; finding that defendant is not amenable by two *nibils*.

If one be bail for several, and before the return of second *sci. fa.* plaintiff takes one of them in execution, yet he hath not thereby disabled himself to have execution against the other principals, for the bail undertook to bring them all in.

1 Lev. 225.
2 Jo. 96.
Salk. 603.
Ray. 1176.

4 New Abr.
420.
Moor 432.
Cro. El. 597.
Lev. 225.

2 Jo. 96.

Cro. Ja. 97.

Cro. Ja. 320.

2 Lev. 195.
Vent. 315.
2 Mod. 312.
2 Jon. 75.

1. Lil. Abr.
187.
2 Salk. 600.

† In *B. R.* the *sci. fa.* must be laid in *Middlesex*, because the recognizance is supposed to be taken at *Westminster*; otherwise in *Error*, for the recognizance there is taken at chambers before a Judge.

Stil. 9.
All. 12.
Hob. 195.

In *C. B.* it is a record by the caption, and becomes obligatory where taken, or in *Middlesex* where filed.

4 New Abr.
423.
Cro. Car.
313.

Also, though regularly the first *sci. fa.* upon a recognizance to have execution, ought to be in the county where it was acknowledged, yet if it be returned that he hath no lands there, that no heir can be found, or that the party is dead, a *testatum sci. fa.* may issue to any other county, where the party furniseth that there are lands.

2 Lutw.
1287.

It hath been resolved that a *sci. fa.* on a recognizance taken by commissioners in the county of *York*, may be brought in *Middlesex* or *York*, at the election of the party.

Stil. 105.

If judgment be against *A.* to account, and *manuaptors* be found by him to appear before the auditors assigned, no *sci. fa.* lies against *manuaptors*, without a certificate from the auditors to the court, that he, *A.* hath not conformed; for the auditors are judges of the cause, and may excuse the non-appearance, and may appoint a shorter or longer day for the party to appear, as they think fit.

4 New Abr.
422.

† The *sci. fa.* must be brought in the same court and county where the action was originally laid.

Where.

Where *sci. fa.* is against the bail, it should Salk. 599.
be in *ea parte*; if against defendant, *in hac*
parte.

The *sci. fa.* may bear *teste* the day of the 2 Ray. 1567.
return of *ca. fa.*

In *C. B.* there is but one *sci. fa.* against 8 Mod. 227.
bail, and upon a *nihil* returned, then is exe-
cution; but in *B. R.* the course is, to have
two, but both must not be sued out together,
as formerly; for the first shall be duly re-
turned before the *alias* is issued, which must
bear *teste* on the return day of the first; and
fifteen days inclusive between the *teste* of the
first, and *return* of the second. Now the
court was moved to set aside a judgment
obtained against bail on two *sci. fa.*s.
brought against them, because it did not
appear that the judgment was had on the
return of two *nibils*. It was referred to the
master to examine this matter.

Carth. 468.
2 Salk. 599.
2 Jo. 228.
Cro. El. 738.
Lutw. 26.

But when judgment is awarded on the 2 Keb. 51.
sci. fa. against bail, the bail are remediless.

Judgment on a *sci. fa.* against bail, was Salk. 89, 603.
reversed on a writ of error, because there Faresl. 3.
was no warrant to the *sci. fa.* for these are 5 Mod. 397.
distinct actions, therefore there ought to be Carth. 447.
a particular warrant of attorney to this *sci. fa.* 6 Mod. 304.
against the bail; and it ought to be entered Cumber.
upon the return of the *sci. fa.* for then this 149, 161.
suit commences, which is a new cause and a Salk. 402.
different record. And *Ch. 7.* held that upon

this writ of error the record of the judgment should not have been certified.

1. *lev.* 246.

Sci. fa. not being grounded on any bill, must be returnable on a return day; in this case, it did not recite the condition of the recognizance, which was to pay the money, if judgment affirmed in error; then it had been in the nature of a bill, and good; but here it is a writ, and ill. The clerks agreed that this was the constant usage, and court staid the judgment.

1 New Abr.

217.

If defendant gives judgment with stay of execution, plaintiff may sue out *ca. fa.* returnable before the day, to warrant a *testatum* against defendant; but no such *ca. fa.* shall be sued forth to warrant a *sci. fa.* against bail, because it is to the prejudice of a third person.

2 Ball. 260,

261.

Cunn. Dist.

After judgment against principal, and *nihil* returned on *ca. fa.*—(but before such return was filed,) *sci. fa.* was issued against the bail. One of them brought an action against principal, and he being taken thereon and brought into court, bail prayed that he might be delivered in execution for the debt on the judgment, which was done, and plaintiff was enforced by the court, of necessity to pray the body of the principal to be committed in execution for the debt.

SECT.

PLEA to the SCIRE-FACIAS.

27

SECT. II. Of PLEADING to the SCIRE-FACIAS.

Bail, and principal, may either render to the recognizance fuit, or plead. If they appear by attorney and plead, they have chosen to avoid the recognizance by fuit, and thus fix themselves; for what they plead will be as a justification for not rendering. 2 Roll. Rep. 382.

This matter will be rendered the more clear by dividing it into

1. *What may*
2. *What may not* } *be pleaded to a sci. fa.*

1. *What may be pleaded.*

If there be no *ca. fa.* sued out, returned and filed, it is no ground for a motion to quash *sci. fa.* but bail may plead it, and be thereby discharged. 2 Crom. 81.

A surrender may be pleaded, but then plaintiff must have had due notice thereof. 1 Roll. Abr. 337.
Moor. 888.
1 Leon 58. 2 Bulst. 260.

A dilatory plea may be pleaded, as “*nil tuel record*”—but then they can never render principal. Law, Obl. 276.

Bail may plead in abatement, as in other actions. Lucas 112.

That plaintiff had other execution. 2 Crom. 88, 89.

A payment of a sum recovered, if before return of second *sci. fa.* else it is a bad plea. 4 & 5 Anne. c. 16. s. 12.

Hob. 210.
Sid. 216.
1 Keb. 185.

If bail plead defendant's render, they must conclude "as appears by the record," &c. But on the other hand it has been adjudged if bail plead a render, they must conclude "as appears by the record," and not to the country; for it is not a matter to be tried, but by the record; and they must say in the plea, that "the principal came here into court, and in the same court rendered himself, and was by the same court committed;" but the render and commitment is void, if done on a day which is *non juridicus*, like *Candlemas-day*, &c.

1 Lil. Abr.
186.

They can plead a release given by plaintiff to defendant, and it is good.

2 Show. 147.
1 Cunn. Dict.
tit. Bail.

In a joint action, *J. S.* is bail for one of them, and there is judgment against principals; in a *sci. fa.* against *J. S.* it is sufficient to alledge that defendant, for whom he was bound, did not pay the money; and if the other had paid it, he should have pleaded it.

1 New Abr.
217.
Rol. Abr.
336. Jo. 29.
2 Mod. 28.
Sty. 324.
Poph. 186.
3 Salk. 57.

Bail may plead defendant's death before the return of *ca. fa.* and may be discharged on this plea.

Hut. 47. Winch. 61. Cro. Ja. 97. Godb. 354. Moor 175.

But this plea must not say that he died before the return of *the ca. fa.* but before the return of *any ca. fa.*; that it may appear he was not alive at the return of the first *ca.* for if he was the recognizance is forfeited.

Death

Death of the principal on the day of the judgment, is a good plea, for they cannot have a writ of error to reverse the judgment. Cro. El. 99.

Bail may plead that principal died before any judgment against him, because they cannot have writ of error to reverse the same; but in another case, the whole court except one, inclined otherwise. Cro. El. 199.
2 Leon. 101.
See Godb. 377.
Roll. Abr. 742.
2 Mod. 308.

2. *What cannot be pleaded to a sci. fa.*

They cannot plead defendant's death before *sci. fa.* sued out, without more matter; for if he die after return of *ca.* this will not excuse the bail: the plea must be, that he died before return of *ca. fa.* 4 New. Ab. 420.
Cro. Ja. 97.
163.
Hut. 47.
Roll. Abr. 336.

They cannot plead that plaintiff arrested principal in stannary court, wherefore they could not have his body to render him; for they might have had a *ba. cor.* Moor 406.

They cannot plead that plaintiff by *testatum ca.* took defendant before return of second *sci. fa.* and still hath and detains him, for the recognizance was forfeited before. 1 Vent. 314.
2 Jo. 75.
2 Mod. 312.

They cannot plead a render in time, if no notice was given thereof to plaintiff. Leon. 58.
2 Bulst. 260.
Moor 883.

Bail cannot plead payment of debt, unless satisfaction be acknowledged of record; for a *nude payment* cannot avoid matter of record; Cro. El. 233.

- 2 Keb. 577. cord ; this plea should also specify time and place where paid.
- 3 Keb. 349. Payment before return of *sci. fa.* is no plea; yet before *sci. fa.* sued out, it is by the bail. Bail pleaded payment by the principal before *sci. fa. viz.* on the same day ; but after the *ca.* is sued out, this is no plea, nor saves the recognizance.
- 2 Lil. Abr. 431. A payment and acceptance of a lesser sum than the judgment, in satisfaction, is no plea; for altho' bail may plead payment to plaintiff, in regard the recognizance is to pay the condition money, or render defendant ; yet the bail shall not plead payment of a lesser sum after the money became due:
- 12 Mod. 112. So, bail pleaded that before return of second *sci. fa.* defendant in original action paid the money ; to which plaintiff replied, and instead of defendant concluding to the country, the issue being tendered, concluded with " and this he is ready to " verify ; " whereon the plaintiff demurred. *Per cur.* Bail may plead payment by principal, but it must be in a right manner, which is not done in this case, because the recognizance was broke before suing out the first *sci. fa.* and therefore pleading payment before the return of the second has not the colour of a good plea ; whereon it was urged, that plaintiff could not have judgment,
- 1 Ray. 157.
Digest K. B.

judgment, because he prays execution for the debt and damages; whereas it should have been for damages only; for the recognizance in this court, not being in a sum certain, K. B. there can be no debt created in the bail thereby. *Per cur.* We will reject for the debt as surplusage, wherefore let plaintiff have judgment. After which defendant brought writ of error in the *Exchequer* chamber, but on motion, plaintiff had leave to take out execution; for no writ of error lies on *sci. fa.* in that court.

In a *sci. fa.* by an executor of plaintiff on a judgment, defendant pleaded that testator sued execution by *sci. fa.* against the bail, and had judgment and execution against them; it was held no plea, because not shewed that the plaintiff was satisfied by the execution against the bail, for otherwise, without satisfaction, he may always charge the bail. 4 New Abr. 421. Cro. Ja. 545.

They cannot plead writ of error depending on the principal judgment. 1 Lil. Ab. 186.

If defendant obtain an injunction after bail put in, and same is continued over several terms, and then the cause recurs, and there is *sci. fa.* against the bail, they cannot plead this as delay, for it is the act of the court. See 3 Mod. 274.

In a *sci. fa.* on recognizance against bail, defendant pleaded writ of error brought by the principal; and by the court this is no plea, Comb. 295.

plea, for the writ of error on the special judgment doth not affect the recognizance. But by *Holt Ch. J.* I have known an attachment against a town-clerk for proceeding in an inferior court after a writ of error here, but I never took it to be right.

SECT. III. Of Execution on the scire fa.

Str. 1139.

If there be fifteen days between *teste* and return of second *sci. fa.* against bail, it is sufficient, without any regard to the number of days between the *teste* and return of each; and *ca. fa.* may be taken out against the bail, without any *fi. fa.* or return of *nulla bona*.

1 Roll. Abr.
398.

Ca. fa. was brought against bail, court refused to set it aside; but by *Roll.* it will not lie; and it seems far from being reasonable that it should.

1 Lev. 226.

Though the *sci. fa.* is joint, the execution thereon may be several; yet if a moiety of the damages be levied on one, and the other moiety cannot be made on the other, the plaintiff cannot recur on the former by a new writ, for he might have levied the whole at first: thus, it is clear, one bail is liable for the whole debt.

And

And tho' the recognizance be to levy on the goods and chattels, yet execution against his body is good, and this by *ca. sa.* 1 Lil. Abr. 185.

C H A P. XI.

O F B A I L I N E R R O R.

FOR the more clear investigation of this subject, it may be properly divided into the following heads:

SECT. I. *General observations incident to WRITS OF ERROR, shewing when they lie, or do not lie, in cases of BAIL.*

SECT. II. *In what cases in Error BAIL is, and is not requisite.*

SECT. III. *Of putting in and perfecting BAIL in Error.*

SECT. IV. *How far BAIL in Error are liable.*

SECT. V. *Of surrendering plaintiff in Error in discharge of the BAIL.*

SECT. VI. *Of execution on the affirmation of judgment, and herein of the scire facias in error.*

SECT. I. *General observations on Writs of Error, shewing when they do lie or not, in cases of BAIL.*

A writ of error lies in the *Exchequer* Yelv. 157. chamber for error in process, but not for error in judgment.

Judgment

he cannot be bailed in *B. R.* because there is no record there, nor can he be bailed in *Exchequer*, for they have authority only to reverse or affirm the judgment.

Stra. 867. When writ of error is taken out, allowed, and served, no execution can issue against defendant or his bail.

Stra. 1186. It seems, that if writ of error be allowed after *ca. fa.* sued and before the return, it prevents the sheriff's execution. And it is agreed, a writ of error supercedes an execution from its allowance or notice thereof; but in *C. B.* from the delivery to the clerk of the errors, and plaintiff cannot call for return of *ca. fa.*

Stra. 526. But the court refused to set aside a judgment on *sci. fa.* tho' obtained pending the error of the principal.

4 *New Abr.* 212. If *A.* recovers against *B.* in *B. R.* damages and costs, and thereupon hath judgment against bail after a *sci. fa. &c.* and after *B.* and the bail join in a writ of error, and then a year and a day passes, in this case notwithstanding this writ of error, the court of *B. R.* may grant execution, for this is a void writ of error; and as if none had been brought, and therefore it shall be no continuance of the first judgment; but the year and day being past, plaintiff cannot have execution without a *sci. fa. tho'* the year passed after the writ brought.

SECT. II. *In what cases BAIL in ERROR is, and is not requisite.*

1. *Requisite.*

No execution shall be staid, on or by any writ of error or *superfedeas* thereon, to be sued for reversing any judgment in any action or bill of debt, or any single bond for debt, or on any obligation with condition for the payment of money only, or for rent, or any contract sued in any courts at *Westminster*, counties palatine or great sessions in *Wales*, unless plaintiff in such writ with two sureties allowed by the court wherein judgment is given shall first be bound to the party for whom judgment given, by recognizance to be acknowledged in the same court, in double the sum adjudged by said judgment, to prosecute writ of error with effect, and also, to pay and satisfy, if judgment be affirmed, all debts, damages, and costs, adjudged on the former judgment, and all costs and damages to be awarded for delaying execution. See also, 31 *Eliz.* c. 3. f. 3.

3 Ja. 1. c. 8.
made perpetual by 3 Car.
c. 4. f. 4.

On this statute it hath been *adjudged*, that judgment on *in simul computasset* was not an action founded on such a contract as came within the meaning of the statute.

2 Bulst. 53.
Yelv. 227.
1 New Abr.
212.

2 Burr. 746.

A bond given to a third person, by a third person, as a collateral security for paying to creditors 15*s.* 6*d.* in the pound, upon a liquidated total of his debts, is a bond with condition for payment of *money only*, and within this statute.

Show. 14.

Comb. 105.

1 New Abr.

212.

11 Mod. 2.

So of a debt due by arbitration, judgment on a demurrer on a bottomree bond for payment of money and performance of covenants, are not within the statute. 3 *Ja.* 1. c. 8.

13 *Car.* 2 *ft.* 2. c. 2. *par.* 9. That no execution shall be staid after verdict, and judgment, in actions for not setting out tithes, actions on case, on any promise for payment of money, *trover*, covenant, detinue and trespass. See 4 *Mod.* 7. *Cro. Car.* 59, 410. *Hob.* 127. 8 *Mod.* 79, 237.

Carth. 121.

3 *Lev.* 275.

16 & 17 *C.* 2. c. 8. *par.* 3. extends to writs of error on judgments after verdict in dower and ejectment.

Sid. 183.

If an executor bring a writ of error he shall find bail within, 13 *Ja.* 1. c. 8. to answer the principal's debt; but he shall find bail to answer the double costs upon Statute 13 *Car.* 2. c. 2. if it be found against him.

2 *Crom.* 308.

Wood 580.

16 & 17 *C.* 2.

Judgment against executors, or administrators *de bonis propriis*, they must put in bail in error; otherwise if it is judgment *de bonis testatoris* only.

The statute says, bail shall be required on bonds, *for payment of money only*; it was therefore contended, that plaintiff in error need not put in bail, the original action having been brought on a bottomree-bond; but the court held it necessary, since the judgment had confirmed the contingency.

Stra. 476.

But in a similar case, *Holt*, C. J. held it unnecessary, for the voyage, return and payment, are contingencies; but it was adjourned.

11 Mod. 260.

On a writ of error on judgment in *Ireland*, the record being removed into *K. B.* here, the court took bail, and sent directions to have defendant set at liberty there.

1 New Abr.

213.
Palm. 286.

It is a rule in Error, that if error be assigned in *matter of law*, then the use is to take bail of the party; but if it be on *matter of fact*, then that no bail be taken till that fact be tried.

3 Bull. 63.

Though plaintiff in *audita querela* shall be bailed, yet one in execution shall not; this was in a case of error brought by a convict.

Sid. 286.

In writ of error brought to reverse an outlawry, bail must be put in before the allowance.

31 El. c. 3.
Freem. 162.

If there is judgment in *K. B.* and defendant is taken in execution, and after brings writ of error in *Exchequer* chamber, and the

Cro. Ja. 108.
Cro. El. 731.

record is removed, he cannot be bailed in *K. B.* because there is no record there; nor can he be bailed in the *Exchequer* chamber, for they have authority only to affirm or reverse the judgment.

Dier 139.

3 Lev. 113.

Defendant in execution brought writ of error, and prayed to be bailed. All the court held, if there be any error apparent, he shall be bailed, and the parties shall be bound to answer the debt if the judgment be affirmed, and not to deliver the body in execution.

3 Ven. 463.
cites MSS.
rep.

Sheriff brought debt upon bond, and judgment was had by *nil dicit*, without oyer of the condition, and a writ of error was brought upon the judgment, and a *superfedeas* taken out; it was moved to set aside the *superfedeas*, because the plaintiff in error had not put in bail according to 3 *Ja. 1. c. 8.* On the other side, it was said, that the bond was *for appearance*, and so out of that statute; to which it was answered, that it appeared upon record to be an obligation for *payment of money*; and that the court must confine themselves to the record, and judge upon that only; but *per tot cur'*, it was held that they ought to examine into it by affidavit; for, otherwise, plaintiff in error would be obliged to put
in



BAIL in ERROR not requisite.

101

in bail, contrary to the intent of the statute, because the declaration was only upon the penalty, without mention of the condition.

2. BAIL not requisite.

One bond reciting another, and conditioned, that "if the money in the former bond be paid, then this to be void, otherwise, &c." plaintiff had judgment thereon, and defendant brought writ of error. The question was, whether special bail was to be put in according to 3 *Ja. 1. c. 8.* By *Parker, C. J.* this bond stands only as a security for damages, and may be discharged without one penny to plaintiff; and there is no difference between this bond, and a bond to save harmless, and therefore out of the meaning of the act; and *Pratt J.* thought this case, though possibly within the words of this act, yet it is out of the meaning of it, which is plainly this: that where a recovery does necessarily import a debt, there this act takes place; but not where a recovery may or may not import a debt due; and the reason is, that delay in the latter case is not esteemed so prejudicial as in the former: *Sed adjournat.*

On writ of error on a judgment on bond, with condition to perform covenants, or on

1 *Lev. 260.*

2 *Crom. 304.*

1 *Will. 19.*

bail-bond, no bail requisite, because the words of the statute are for payment of money only.

3 Burr. 1548. Bail not requisite on writ of error on judgment in an action of debt founded on a superior judgment; this is a *casus omisus* in 3 *Ja.* 1. c. 8.

Yelv. 227.
2 Bulst. 53. Judgment in action on matter of account, thereby reduced to a certainty, bail is not requisite; so in an award; but it may be generally collected from the books, that this statute, 3 *Ja.* 1, confines bail in error to all actions which originated in *debt*, and for certain engagements for payment of a sum absolutely.

Barnes 194. Bail bringing writ of error on an award of execution or recognizance, against themselves, no bail is requisite.

Wood 580. Heirs, executors and administrators are not forced to give bail on a writ of error.

3 Burr. 1548. Bail is not requisite upon bringing a writ of error upon a judgment in an action of debt, founded upon a prior judgment; for the contract is extinguished by the first judgment. The judgment is no contract, nor can be considered in that light; for *judicium redditur in invitum*; and the action of debt on a judgment is of a superior nature to an action of debt on bond, or any of the other actions specified in 3 *Ja.* 1. and therefore
not

not included in it, agreeable to the reasoning in 2 Rep. 466. And that statute must be taken literally, and not extended, see 3 Keb. 802. this is also a *casus omiffus*. Hence though in the original action bail was requirable, yet it ought not to be required in writs of error, upon actions of debt brought on such judgments.

The rule, fet aside the return of the *ca. fa.* and stayed proceedings, but not with costs. *N. B.* This was on the decision of the twelve Judges, because the precedents of each court had been found to differ in the construction of this statute.

Persons in execution for a fine to the king, brought *ha. cor.* and writ of error, and assigned errors, and prayed to be bailed, which the court refused; but it was said to be usual in the *Crown-Office* to bail in such cases. Sid. 326.

One in execution is not to be bailed on bringing writ of error in parliament, because it is uncertain how long the parliament may continue. 2 Bulst. 262.
1 New Abr. 213.

The court were inclined in a subsequent case to hold, that bail is not requisite on bringing a writ of error returnable in parliament, upon a judgment in *B. R.* in debt on a recognizance in error. But the question was adjourned, and never resumed: but 3 Burr. 1567.

- Crompton* queries this doctrine, and adds from *Salkeld*, that on error in parliament of judgment affirmed in *B. R.* new bail is requisite. And it has been laid down in former reports, that new bail must be put in on every new writ of error. Bail in error does not include costs assessed in parliament; therefore a new recognizance in error brought there after affirmance in *B. R.* seems necessary.
- Salk. 97. And afterwards the court, *on consideration*, held that there must be fresh bail in error brought in parliament after affirmance in *K. B.*
- Ray. 840.
7 Mod. 120.
8 Mod. 79. Where no bail in error is required, the bail applying to stay proceedings, must undertake for the costs on the writ of error.
- Stra. 527.
- Stra. 877.

SECT. III. *Of putting in and perfecting BAIL in ERROR.*

- If plaintiff brings his writ of error after a verdict, it is in most cases required he should give security for prosecuting the same; and this, before any *superfedeas* can issue on the writ of error; and without it, execution on the original judgment is regular. This is to prevent delay by frivolous appeals, and for securing debt and costs, which are become payable by the verdict by the vanquished party, in all except a few particular instances under these statutes.
- 3 Bl. Com. 410.
3 Ja. 1. c. 8.
13 Car. 2. c. 2.
16 & 17 C. 2. c. 8.
1 Lil. Abr. 176.
2 Burr. 746.
3 H. 7. C. 10.
13 C. 2. c. 2.
8 & 9 W. 3. c. 11.
4 & 5. Ann. c. 16.

These

These bail must in like manner, as in the first instance, enter into a recognizance in double the sum of the debt and damages, to prosecute the writ of error with effect; and if the judgment be affirmed, or writ *non professed*, to pay all the debt, damages and costs adjudged, and all costs awarded for delaying execution. 19 G. 3. c. 70. s. 5.

As soon as plaintiff in error has got his writ allowed, he should enter into recognizance, and get his bail put in; although plaintiff in the original action has not yet proceeded to tax costs; else for want of this he is entitled to a *hab. fac. possessionem*. Barnes 212.

It is not the business of this court to examine whether bail was put in on the first writ, for the want of that does not hinder the process of the writ of error, but only makes it no *superfedeas*.

Four days after the allowance of the writ of error is limited for plaintiff in error to put in bail; of which notice must be given, and exception made in twenty days. Plaintiff may have a rule from the clerk of errors for better bail, who shall justify in four days, else execution may issue on the judgment; and if it be in vacation, such justification may be before a Judge. 1 New Abr. 213.

If bail in error be not perfected in four days after exception, the clerk of the errors shall *nonpross* the writ of error. Rule C. B. Mich. 6 Geo. 2.

The

2 Will. 244.

The courts are so strict in the time allowed to put in this bail, that they never grant further time on any pretence, for in general defendant cannot suggest any real error; the delay they discountenance.

1 Salk. 98.

Defendant in error has twenty days to except to bail, and need not give plaintiff notice; but cannot take out execution without giving plaintiff a four-day rule to put in better bail; but in all other cases he must give notice. This exception must be entered in the book of the clerk of errors, and then the rule taken out and served within twenty days.

Stra. 821.

1 Will. 213.

Upon error in debt on bond, the bail are to be bound in double the penalty recovered; but by the course of the court it is sufficient if they justify in double what is really due.

3 Lev. 113.

An infant being in execution upon a condition in debt, brought writ of error; his father and brother became bail. It was the opinion of the justices that they two only should enter into the recognizance that the infant should appear; and that, if judgment affirmed, they should pay the money: and not that they shall render the body of the infant again to prison; for that when once he is discharged of the execution, he shall never be in execution again at the same suit.

After

BAIL in ERROR liable.

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After judgment for plaintiff it was assigned for error, that no bail was entered for defendant. It was shewn to the court that the attorney was dead, but had been paid his fees for entering it; and that this appeared by his books, and plaintiff prayed that bail might be entered; and so it was ordered. Rol. Rep. 372.

SECT. IV. How far BAIL in ERROR are liable.

If plaintiff doth not assign errors, and bring *sci. fa. ad aud. err.* it is a forfeiture of the recognizance. 1 Rol. Rep. 329.

The rule upon error brought after verdict, in ejectment for rent, is to justify bail in double the rent due. Burr. 2501. 2 Crompt. Pr. 307.

A recognizance in error in ejectment ought to be in the value of two years *mesne profits*, and double costs is usually taken in both courts. Ibid. Barnes 103.

Judgment was affirmed in error, and the court resolved that matter which is assignable for error by the principal, is not so by his bail. Stra. 197.

If *A.* becomes bail for *B.* in an inferior court, and there judgment is given for *B.* and thereon plaintiff brings writ of error, 1 New Abr. 212. Cro. Ja. 94. 2 Jo. 96. and

and that judgment is reversed; it is as if that judgment had never been, and as if at the first the principal had been condemned in the inferior court.

Noy 18.
1 Lil. Abr.
110.
Cro. Ja. 636.
pl. 4.

Bail are liable for damages and costs on the first judgment, but not for the costs of writ of error: tho' it seems by the latter words recited of 3 *Ja. c. 8. ante*, p. 97. that they are liable to "the debt, damages, and costs, adjudged at the former judgment, and also, to all costs and damages to be awarded for delay of execution."

1 New Abr.
212.
Rol. Abr.
335-
Cro. Ja. 636.
Cro. El. 587.
Noy 18.
1 Lil. Abr.
179.

And in explanation of this statute it has been adjudged, that on affirmance of the judgment, no execution shall go against bail in the original action for the costs *occasione dilationis executionis*; for the party might have compelled defendant in error to put in bail pursuant to 3 *Ja. 1. c. 8.*

S E C T. V. *Of surrendering Plaintiff in Error, in discharge of BAIL.*

1 New Abr.
212.
Moor 853.
2 Crom. 310.
1 Lil. Abr.
173.
Wood 580,
608.
3 *Ja. 1. c. 8.*
Cro. Ja. 402.

Bail in error cannot surrender principal in discharge, for the condition of the recognizance is absolute for the prosecution of writ of error, or payment of debt, &c. but this is only *pendente errore*.

But

But in another case the court were divided on the same point, and gave judgment in favour of plaintiff, because of some defect in the plea.

3 Bulst. 191.
Rol. Rep.
392.
3 Mod. 87.
Jenk. 129.

Pending error bail rendered principal; this was held good, though he could not be prayed in execution, before the affirmance or disaffirmance of the judgment: and if principal renders himself before the return of the *sci. fa.* in error, and pending error dies, the bail are discharged.

3 Bulst. 341.

A *commititur*, though no judgment, must be entred pending error; but if judgment be affirmed, the party must pray to have him in execution.

Jo. 128.

On affirmance of judgment against principal, bail may render principal before any *sci. fa.* and the render here is a render below, the recognizance being removed, and may be done before a judge.

2 Keb. 635.

SECT. VI. *Of execution on the affirmance in error; and herein of the scire facias.*

A writ of error was brought by the bail, to reverse two judgments in *Ireland*; that against the principal, and that against the bail: the court held, first, That the writ was abated in the whole. Secondly, That the record of the judgment against the principal

Freem. 416.

principal was not removed by this writ, and so, it was said, had been resolved formerly in one *Booth's* case, cited by *Ch. J.*; but the question was, how the defendant in writ of error should proceed to have the fruit of his judgment against the bail, the record being removed hither, and so they could not grant out execution in *Ireland*? And it was proposed by *Hale Ch. J.* to take *sci. fa.* into *Middlesex*, on the recognizances which are now here, and on return thereof to grant execution in *Ireland*. But it appearing afterwards, that those judgments were not made records here, by reason they were not entred on the roll, they said they would send a certificate to the *Ch. J.* in *Ireland*, that nothing should be removed here, and thereupon they might grant execution; but upon the judgment against the principal the party might have execution there, for the record was never removed.

And now of the SCIRE-FACIAS in ERROR.

3 Keb. 396,
424.

Scire facias cannot issue till judgment be affirmed.

8 Mod. 130.

Proceedings on *sci. fa.* should be staid, if defendant in *sci. fa.* will confess judgment, and enter into a rule to pay the debt, or to deliver

SCIRE-FACIAS in ERROR.

III

deliver up the principal, within four days after the judgment shall be affirmed.

It is not necessary that *sci. fa.* in error ^{3 Burr. 1723.} should lie in the office before the return; but in *sci. fa.* against bail, it is necessary it should lie four days; and the rules made for these writs to lie four days in the office, do only relate to *scire facias* against the bail.

A writ of error was brought in the *Exchequer* ^{5 Burr. 2819.} chamber by principal; *sci. fa.* having issued against his bail, they obtained a rule to stay proceedings until same should be returned, and undertook to pay debt and damages in four days after affirmance: judgment was affirmed, and defendant brought writ of error in parliament; bail moved for further stay of proceedings till that writ should be determined. This was granted, for the first rule could only imply the final determination, and it would be absurd to suppose the bail should be obliged to pay a debt and damages, whilst they remained uncertain, or whether payable at all.

PLEADING to the *sci. fa.* in ERROR.

In a *sci. fa.* after an affirmance in error, ^{4 Burr. 2126.} the bail pleaded a payment, and used all methods

methods of delay, till the interest exceeded the costs allowed on ordinary taxation; the court ruled that the master should allow interest from the time of affirmance.

Ibid. 1097.

And this decision seems founded on a former case of *Bodily* and *Belamy*, where the counsel thought it proper to withdraw his motion, and advise his client to pay the interest.

* * This question has been mentioned here only, as it occurred in the subject of bail's pleadings to *sci. fa.* the question is in itself very important, and there are various authorities on either side; but the above decision seems to agree in the modern doctrine, and the court generally grant interest under another name, "Damages," in conformity to that word in the statute 3 *Ja.* 1. and the *quantum* of those damages for reason of delay of execution, is the calculated interest on the original debt, and damages as taxed, from the date of the judgment up to the day of affirmance. I have a manuscript note of a special argument on this head in *Trinity* term, 1782, where the above doctrine seemed to lead the court; the decision was from time to time adjourned, and in the course of the long vacation the plain
tiff

tiff in error thought it most prudent to compromise with half the interest, which the parties accepted.

M. was bail for defendant, and before judgment, plaintiff gave *M.* a general release; when the judgment was given, plaintiff proceeded as usual, and *sci. fa.* against bail, *M.* pleaded the release held not good plea. 5 Rep. 70.

To a *sci. fa.* on recognizance in error, defendant pleaded that during the life-time of principal, he prosecuted with effect; plaintiff replied, he did not cause record of *B. R.* to be certified into *Exchequer*; defendant rejoined he was staid by an injunction; court held the recognizance not forfeited. 2 Keb. 53. 70.

* * * Before the foregoing subject were quite closed, and a new subject entred upon, it was at first intended to introduce the remedies which the law had provided for bail, in any cases where they were oppressed by any hard proceeding, and this by the old method of *audita querela* but as the summary ways of motion and summons have been lately adopted by the course

of the courts, in preference to a new and tedious suit, perhaps in the whole as painful as the disorder it was to correct, so it becomes altogether useless in this place to state what the curious reader may find in the abridgments under that article ; and where he will find a diversity of doctrine to answer the purposes of those who come into court to relieve or support their errors of practice, and are happy to find some cases that will back their motion which ever way they wish it to apply.

C H A P. XII.

Of BAIL on a writ of HABEAS CORPUS.

•• As the use of the writ of *Habeas Corpus* in civil cases, tends more especially to the removal of causes from one court to another, or persons from one gaol to another, and not so much for their personal liberty, as in cases of the crown, the recital of the act of *ba. cor.* will be deferred till this subject is taken up in the second part of this work ; in the mean time, so much as merely concerns the civil side of the question may be here laid down in the following order.

SECT.

BAIL ON HABEAS CORPUS.

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SECT. I. *General observations on this head.*

SECT. II. *When BAIL is and is not requisite on Habeas Corpus.*

SECT. III. *Of putting in the BAIL, &c.*

SECT. IV. *How far they are liable.*

SECT. I. *General observations on this subject.*

IF defendant is in custody in an inferior court, and removes the cause by *ba. cor.* he cannot be discharged till his bail be put in to the writ and perfected; but it is therefore better to put in bail below, and then remove the cause, and so procure his liberty the sooner.

Mich. 1654.
2 Crom.
359.

If plaintiff has declared before *ba. cor.* be delivered, bail shall be special only as to that action, and shall be common to the other; but if no declaration before *ba. cor.* delivered, then bail put in on the *ba. cor.* shall be special bail to all the actions of plaintiff against defendant of that term, and plaintiff cannot declare before the writ be allowed: this was an action on the case; and two declarations, one for *words*, the other for *assumpsit*.

2 Crom. 361.

The court will not bail a prisoner who appears in court on return of the *ba. cor.*

1 Lil. Abr.
185.

until the same be filed; for before that, it does not appear for what cause he stood committed.

SECT. II. *When BAIL is, and is not requisite on the ha. cor.*

- Salk. 98. Salkeld says generally, that bail is requisite in all cases, on a *ha. cor.* except executors and administrators.
- 19 G.3.c.70. No cause shall be removed from any of the courts below by *ha. cor.* for a debt under 10 *l.* unless defendant shall enter into recognizance with two sureties in the court below, in double the sum for which action is brought, for payment of debt and costs, in case of judgment against him.
- 2 Crom. 357. An heir, executor, or administrator, altho' he has put in bail below, shall not upon removal put in bail above, *to pay condemnation money*; yet he shall put in bail above to appear to a new bill, or original, within two terms, but not after. But if debt is brought on a judgment, suggesting a *devastavit*, he shall give bail, for then the action is in *debt* and *detinet*.
- 2 Lev. 268. 2 Lev. 284. In all cases of removal but that of a *devastavit*, where bail be found in an inferior court, special bail shall be found above: This was a rule at that time, whether the sum

sum was more or less than what the bail was allowed for above; but now, inferior as well as superior, are all restrained to bail for 10 l.

When a cause is removed by *ba. cor.* Cro. Ja. 92. it is the course of C. B. to take recognizance of bail before an action brought, and they ought to take notice of the course of the court.

And by the course of the court (K. B.) 4 Burr. 1993. bail must be put in above.

On the removal of a cause from an inferior court, the court, on motion to be admitted on common bail, said they had not then power to examine whether the cause of action was such as to require special bail, and though it were under 10 l. would require bail. Salk. 98, 101. Sid. 418.

On return of *ba. ca.* if court are doubtful whether to admit defendant to bail, he may be bailed to appear *de die in diem* till they are determined. 5 Mod. 22. Sty. 16.

On *ba. cor. ad faciendum et recipiendum*, 7 Mod. 9, there shall be bail *de novo*. Defendant condemned a ship for not being registred in England, and plaintiff brought *trover* in London, which was removed by *ba. cor.* Holt Ch. J. said, that though it was upon a *ba. cor.* they might enquire into the cause of action, and if they saw occasion, order

special bail, for otherwise, the inferior court might be made use of to oppress people by laying great actions upon them there; and here, if defendant has acted as a judge, and the matter was within his cognizance, his sentence, right or wrong, binds till it is reversed; and if it were in the Admiralty of France it would be so, and the only remedy is, to appeal.

SECT. III. *Of putting in the BAIL, &c.*

2 Crom. 357. Defendant who has removed a cause from an inferior court into *B. R.* or *C. B.* is not of course obliged to put in special bail there; but it lies with plaintiff to compel him so to do. In order therefore to get bail to the action, plaintiff should take out a rule or order for a *procedendo* to remand the cause, unless good bail be put in within *four days* next after notice of the rule, if in term; if in vacation, *six days*; and then serve copy of this rule on defendant, or his attorney, and unless bail be put in accordingly, and justified, a *procedendo* may be had.

1 Lil. Abr.
179.

Ibid. 358.

Bail cannot be put in on *ba. cor.* till the writ be returned and filed; and then defendant on being served with a rule for bail, must annex the bail-piece to writ and return, and

and acknowledge his bail before a judge, of which plaintiff must have notice: he has 28 days to except, after which time if there be no exception, bail-piece is filed in four days, and the bail stand. In *C. B.* it is 20 days; and unless the bail-piece be then filed, plaintiff will, on certificate thereof, be entitled to a *procedendo*.

Michaelmas.
16 Car. 2.

Plaintiff may serve defendant's attorney with a rule for *procedendo* unless better bail be put in, in four days. If rule be in vacation (in *K. B.*) defendant's attorney must give notice within the rule, of justification on the first day of next term. In *C. B.* it is within four days at chambers, and again on the first day of term.

If special bail be put in conditionally on any *ba. cor.* or *certiorari*, and no rule for better bail or exception in 20 days; then same shall be filed as good bail. But by *Salkeld*, plaintiff has 28 days to except in *B. R.* against filing the bail offered.

6 Mod. 24, 25.

Salk. 98.

By 17 Car. 1. c. 10. (Petition of right) three days after the return, are allowed to bail or remand prisoner; and two days by *ba. cor. act.* (13 Car. 2. *pa.* 3.) that is, after the return is filed; for before then, there is nothing before the court.

5 Mod. 22.

If a cause is removed out of the *Marshalsea*, or other inferior court, *London ex-*

Salk. 97.
6 Mod. 242.
2 Show. Rep.
421, 485.

cepted, and bail below offer to be bail above, plaintiff cannot except to them, but is compelled to take them, because he might, but did not except to them below.

Comb. 1.
Skin. 244.
Salk. 297.
12 Mod. 249.

But it is otherwise in a cause in *London*; for the sufficiency of bail there, is at the peril of the clerk, and he is responsible to plaintiff; but above it is not so: but if bail below (in *London*) are offered above, then plaintiff may except.

2 Lil. Abr. 3.

Where a prisoner is brought up on a *ba. cor.* for bail, in aailable action, they cannot be taken absolutely without plaintiff's consent; and without such consent, the judge will only take them conditionally, and defendant cannot be at liberty till they are absolutely allowed as his bail, otherwise plaintiffs would continually have bad bail forced upon them. So if in vacation a defendant be surrendered by his bail, he cannot be discharged on bail, till next term, unless plaintiff will consent to a justification as of last term.

SECT. IV. *How far these BAIL are liable.*

2 Crom. 360.
1 Lil. Abr.
177.

Bail on *ba. cor.* are liable for all the other actions at the suit of the same plaintiff mentioned in the return; and wherein plaintiff shall declare in two terms after, or else defendant

BAIL to HABEAS CORPUS how far liable.

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defendant shall be discharged on common bail.

If a cause be removed, the bail below are certainly discharged, for by what mode can they be sued? the inferior jurisdiction is renounced, and cannot be resumed, unless *procedendo* should issue for neglect, or otherwise, and thereby remand the cause back during the same term in which it was removed; but if it be remanded in any subsequent term, the bail are discharged.

Cro. Ja. 363.

2 Bulst. 287.

1 Lil. Abr.

183.

1 Rol. 64.

Moor 836.

Skin. 244.

If *procedendo* be delivered before bail be given to the superior court, it should be a *superfedeas* as to the *ba. cor.* and the old bail have stood.

Yelv. 120.

Cro. Ja. 203.

When defendant is out on bail, and is taken by an extent into custody, the bail shall bring him by *ba. cor.* and surrender him to the marshal. There was an opposition to this surrender, but the court allowed it, because the action was prior to the extent.

Salk. 353.

Stra. 641,

1217.

C H A P.

C H A P. XIII.

OF BANKRUPTCY OF THE PRINCIPAL.

* * For the more clear reference, all the cases of the defendant's bankruptcy have been referred to this place, though perhaps they might have been more regular in another. This chapter will shew how the bankruptcy of the principal may affect the bail, in their several powers of surrender, or discharge, &c. And first,

SECT. I. *What relates to the principal merely.*

SECT. II. *What relates to his BAIL*

SECT. I. *What relates to the principal merely.*

DEFENDANT being arrested gives bail to the sheriff, the writ becomes returnable, and defendant a bankrupt. He must nevertheless put in bail above; for the bankruptcy does not exonerate the sheriff, who is liable on the face of the return. But if plaintiff comes in and proves his debt under a commission, the bail are discharged; for thereby he waives his advantageous option.

Bankrupt

Bankrupt producing his certificate, allowed and confirmed, shall be discharged on common bail. And the court will stay the proceedings on the bail-bond.

1 Crom. 36.
Barnes 82.

1 Crom. 81.
Barnes 105.

After allowance of the certificate, bankrupt shall attend at 2s. 6d. *per* day, on the assignees to settle any of his accounts; and if he refuses so to do, on due notice, on oath by them made thereof to the commissioners, they may commit him to *close* gaol by warrant till he conform. Bail is certainly not grantable here, by the word *close*.

5 G. 2. c. 30.
f. 36.

And if he be taken in execution, or detained in prison for debt owing before his bankruptcy, on any judgment obtained before the certificate allowed, he shall be discharged without bail. And if he pay 15s. in the pound, he shall be discharged from all debts due at the time he became defendant, and, if arrested, be discharged on common bail.

f. 13.

f. 7.

After a creditor has proved a debt, he may waive all future benefit of the commission, and hold bankrupt to bail for his debt, as if no commission had issued.

Dav. 434.
2 P. W.
Mich. 1727.
2 Ven. 696.

If the estate of a bankrupt make dividend sufficient to entitle him to an allowance of 200l. he shall be discharged on common bail; his certificate is not noticed. *But see* 5 G. 1.

1 Lil. Abr.
197.

Plaintiff

Plaintiff sued upon a lease for two years rent, in arrear since 1733, when defendant became bankrupt; defendant moved for common appearance, on producing his certificate confirmed; neither the possession or legal interest being then in defendant, a common appearance was ordered.

Bankrupt was committed "until he conform himself to our authority, and be thence delivered by due course of law;" on return of a *ba. cor.* he was discharged, for the statute only empowers the commissioners to commit him, till he submit himself to be by them examined.

1 New Abr.
381.
Carth. 152.
Salk. 348.
Ray. 99, 153.
Comb. 390.
2 Stra. 1005.
5 Mod. 308.

SECT. II. *What relates to the BAIL.*

Plaintiff in an action against the bankrupt proving his debt under the commission, clearly exempts the bail thereby; but they should take out a summons for an *Exoneretur*.

The bail may seize their principal, a bankrupt, while under examination, or going to a court of justice.

1 Crom. 39.
Barnes 113.
2 Stra. 867,
1160.
3 P. W. 479.

Defendant had undertaken to indemnify plaintiff from becoming bail for him, and then became bankrupt; and being arrested by plaintiff, whose recognizance of bail had been forfeited since the bankruptcy, and

against whom process had issued so far as *sci. fa.* he moved to be discharged on a common appearance, urging that he had delivered up all his effects, and that plaintiff ought to come in as a creditor. The court held that though by 7 G. 1. c. 31. debts from bankrupts secured by promissory notes, and payable at a future day, may be proved, and dividends received, deducting a rebate of interest and discount; and by 17 G. 2. c. 31. obligees in bottomree and *respondentia*, and the *Affured* in policies, are provided for; yet this case, wherein cause of action did not accrue till after the bankruptcy, and where the money was to become due upon a contingency, is not within the statutes concerning bankrupts, and therefore plaintiff could not be relieved under the commission, and defendant was held to bail.

7 G. 1. c. 31.

A defendant might have pleaded bankruptcy in the first action, but did not, and there was a verdict and judgment against him; and an action was brought upon the judgment against him, and he moved to be discharged on common bail, because the bond, which was the foundation of the demand, was prior to the bankruptcy. But the court said, we can look no further than the judgment, and therefore he must put in bail.

1 Crom. 49.
Stra. 477.

Sureties,

Com. Dig. Sureties, or bail, when they have been
 527. fixed, and have paid the debt, may prove
 Cro. Ja. 127. that sum under a commission against the
 pl. 17. bankrupt.
 Atk. 135.
 238.
 Ca. 130, 141. 262.

1 Atk. 83. The bankrupt's discharge, and the allow-
 ance of his certificate, will not preclude his
 creditors from proceeding against his sure-
 ties, if obtained subsequent to the action on
 the bail-bond: But if it is obtained before
 1 Burr. 245. the bail are fixed, they shall be discharged,
 436. else they remain liable, if afterwards; for the
 certificate discharged the original debt, but
 not the bail-bond; this is a new and distinct
 cause of action.

5 G. 2. c. 30. If a person, having been duly summoned
 f. 16, &c. by the commissioners to appear before them
 to be examined touching the bankrupt's
 effects, refuses to answer all lawful verbal
 questions, and refuse to sign his answers in
 writing, shall be committed by the com-
 missioners without bail, till he shall submit
 thereto.

Stra. 880. So if a bankrupt be committed for the
 same cause, it is without bail or mainprize,
 But in *Nathan's* case, *Holt* C. J. held, that the
 bankrupt ought to have a copy of the inter-
 rogatories, and should have time allowed him
 to consider his answers.

C H A P. XIV.

OF BAIL IN CASES OF OUTLAWRY.

WHEN defendant has suffered proceedings to go on against him, so far as to the suing out an *exigent*, and even to that writ makes default of appearing at the return, he is adjudged *Outlaw*. And then it is, ^{2 Lil. Abr.} as in many other cases, that he sets about his ^{Tit. Outl.} duty, when it is too late to perform it; and is urgent to recover himself out of so abject a state, as that of becoming an outcast in his own country, which he had never been careful, or taken any measures to prevent. But such is the equity and benevolence of the *British* code, that it professes to afford relief in every case of distress; and therefore inclining, as it were, to recal a penitent to his original condition, even after so great contempt as the refusing attention to every rule of legal proceeding, still allows him to be reinstated, and for that purpose has chalked out a mode which may be readily adopted; and this is called a *reversal of the judgment of outlawry*. In what cases the Bail are concerned in this proceeding, will appear by the ensuing extracts.

The

31 El. c. 3.
 f. 3.
 2 Crompt. 58.

The construction which has been put upon this statute, by a modern able practitioner, is, that it requires bail to be put in before the allowance of the writ of error, only where the error is for want of proclamations. But for any other cause, than for want of proclamations, it is sufficient if bail is put in before the reversal of the outlawry by the writ of error, if the original cause of action required bail. And Lord *Raymond* says, Bail may be put in any time before reversal. But, elsewhere, on a writ of error to reverse an outlawry, no bail till the reversal.

Ld. Ray. 605.

Stra. 951.

4 & 5 W. &
 M. c. 18.
 f. 4.

For the more easy and speedy reversing of outlawries in the court of K. B. it is enacted, "that no person or persons whatsoever, who shall be outlawed in the said court for any cause, matter, or thing whatsoever, treason and felony only excepted, shall be compelled to come in person into, or appear in person in the said court to reverse such outlawry, but may appear by attorney and reverse the same, except when special bail shall be ordered by the said court."

This act is perhaps confined to civil actions, and does not at all extend to criminal misdemeanors; but nothing is clearer than that cases, *after conviction*, are not within it. This construction arose on Mr. *Wilkes's* case, against whom there were two motions; to
 commit

commit him, and, to bail him; both which fell to the ground: The length and importance of which, and the quantity of matter, not so immediate to the present purpose, obliges a reference to the report itself.

If a person convicted be taken on a *capias pro fine*, he is liable to be committed, unless the prosecutor consents to his being bailed; this is a common course of proceeding; though Lord *Mansfield* did not remember any case where such person was bailed without consent. So, a person convicted of a misdemeanor is not within the above statute, for his is not a *bailable case*. 4 Burr. 2527.

The act relates to cases where no special bail is required; and to cases where special bail is required; and the sheriff is directed what to do in either case. Where it is bailable, defendant is to be discharged on the security bond.

But even in civil actions he could not be bailed where he was not bailable; he is only to be put in the same condition, as if he had not been outlawed at all. If the outlawry was after judgment in debt, or any other civil action, and the defendant was not bailable before the outlawry, the act did not make such defendant bailable, who was not so before the outlawry. I am clear that this case is not within the act."

K

Mr.

Mr. J. Yates said, *int. al.* That a conviction in a criminal case cannot be within the act. The sheriff is directed "to take security of the person outlawed, in the penalty of double the sum for which special bail is required." But the sheriff cannot take bail of a person after he is convicted of a crime. The sheriff cannot form his own idea of the offence, or settle a sum, wherein he should take bail. Nor can he require bail in *double the fine*, or any thing more than what the fine shall be fixed at, which is uncertain and future. The concluding words of the security bond—"and to do and perform such things as shall be required by the said court"—mean, putting in bail to a new action, pleading, &c. and it should be considered how the law stood in civil cases *before* this act; and that *no bail* could then be taken on a *cap. utlagatum*.

See 13 Car. 2.
ft. 2. c. 2. f. 4.

If defendant is taken on a *ca. pro fine*, or (*pro redemptione*) it is an execution, and no sheriff can take bail of him. It is a favour if the court does it.

The other judges, *Aston* and *Willes*, concurred in the same opinion. The court was then moved for bail on the foot of the court's discretion. This was denied, because there was no consent of the prosecutor, and defendant stood committed.

He

He was outlawed in two actions, one was for 10*l.* the other for 40*s.* and upon reversing the outlawry, the court took special bail for the first, and an appearance for the other; the recognizance was taken pursuant to 31 *El. C.* 3.

1 Wilf. 3.
2 Crom. 63.
Salk. 496.

It seems a general rule to take bail on reversal of an outlawry; and if a man be arrested on a *ca. utlagatum* (treason and felony excepted) sheriff may take the attorney's undertaking to appear for defendant, and reverse the outlawry; and then he may discharge defendant, but this is when special bail is not required; and where special bail is required, the sheriff may take security by bond with one or more sufficient sureties, in the penalty of double the sum for which special bail is required, and no more,—for his appearance by attorney in court at the return of the writ, and for performing such things as shall be required by the court: and after such bond taken, then to discharge defendant; and if he remains in custody for want thereof, he shall be discharged whenever after he can find the sheriff sufficient security.

2 Lil. Abr.
265.

In a case originally requiring special bail, defendant cannot come in and appear without putting in special bail to reverse the outlawry; for it would be unreasonable that defendant should gain an advantage by standing

3 Burr. 1920.
31 *El. c.* 3.
f. 3.
4 & 5 W. &
M. c. 18. f. 4.

out till process of outlawry: he certainly ought not to be in a better case then, than if he had appeared at first; and the court directed, that the *filacer* should not issue a *superfedeas* 'till defendant had put in special bail, and a week was granted for that purpose.

- 2 Inst. 188. If the party upon a *cap. utlag.* plead *misnomer*, or alledge error, &c. he may be bailed, although persons outlaw are by statute forbidden to be bailed.

3 Ed. 1. c. 15. A man taken by *cap. utlag.* in felony, by the name of *J. S. gent.* he pleaded that he was *yeoman*, and therefore not the person outlawed; and because it was in appeal, *sci. fa.* was awarded against the appellant, if he could say any thing against this plea, and defendant was let to bail.

- 3 Burr. 1482. An attachment was moved for against the sheriff, for discharging a defendant on his attorney's undertaking to appear and reverse the outlawry *without taking security* by bond in double the sum for which bail is required by the statute, which directs this in all cases where special bail is required by the court.

4 & 5 W. & M. c. 18. f. 5.

The *writ* was not marked for bail, though the *exigent* was, and there was an affidavit filed, but the cause of action was expressed in the writ, and it thereby appeared that plaintiff was intitled to bail on the original process. A *cap. utlag.* is not like an arrest, or *mesne* process; nor is the bond required by

the above statute like the *alternative* bond on *mesne* process, to pay the money or surrender the principal; but a bond with one or more sufficient sureties "for the appearance by attorney at the return of the writ, and to do and perform such things as shall be required by the court." As the cause of action was expressed in the special writ original, and as there was an affidavit of the debt, and the *exigent* marked, it was the sheriff's duty to have made further inquiry into the *quantum* of the debts before he discharged defendant; the sheriff may take defendant again, but plaintiff cannot sue out a fresh writ of *cap. utlag.* after he has been taken on the former.

The court were then clear it was not a case within the 12 *Geo. I.* and it was held, 12 *G. 1. c. 29.* the defendant could not reverse the outlawry, unless such bail be put in as the law requires, and by 13 *Car. 2.* no sheriff can discharge any person taken on a *ca. utlag.* "without lawful *superfedeas* first had and received for the same." The court said the sheriff had acted improperly, and advised his attorney to put in bail, and for that purpose enlarged the rule; but in the mean time, the sheriff undertook to pay the debt and costs.

13 *Car. 2.*
stat. 2. c. 2.
s. 4.

Special bail on this writ, is put in with the clerk of the errors, who makes out a

2 *Crom. 65.*

superfedeas for his discharge of person and effects seized if taken, and if not taken, then for sheriff to forbear.

Ibid. 69.
Barnes 86.

Bail upon reversal of outlawry, cannot render principal in discharge of themselves, for they are absolutely bound to pay condemnation money.

CHAP. XV.

Of the SURETIES OR PLEDGES in REPLEVIN:

* * The nature of this obligation has already been explained in the introduction. It may be well to add here, that as pledges are no other than a species of surety or bail, they seemed to claim some notice at the close of this first part. And it must be the duty of the compiler, to shew what the real law is, on this kind of obligation, without stopping to take notice of the extreme carelessness usual in sheriff's offices, as to the responsibility of these pledges, except where the matter in dispute, or goods replevied, are of importance and great value, whereby it has caused the general proceedings after the judgment on the avowry, to be clouded in an almost impenetrable darkness.

darkness, from disuse; it not being worth while to pursue, at a large expence, pledges who are unable to answer the sum recovered, and whereby the honest landlord is defrauded of his just rent, and is subject to the scoffs of low and illiberal tenants.

This subject may be shortly divided into

SECT. I. *Of taking the pledges, &c.*

SECT. II. *How far they are liable.*

SECT. I. *Of taking the pledges, &c.*

SHERIFFS or bailiffs shall not only receive of plaintiff, pledges for the pursuing of the suit, before they make deliverance of the distress, but also, for the return of the beasts, if a return be awarded: and if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the bailiff be not able to restore, his superior shall restore them.

West. 2.
C. 2.

Upon application therefore, either to the sheriff or his deputy, security is to be given in pursuance of the above statute, that the party replevying will pursue his action against the distrainer; for which purpose

B. Com. 3.

he puts in pledges to prosecute, (in like manner as in writs of error, suits which in this particular much resemble replevins) and if the right be determined against him, that he will return the distress; for which purpose he is also bound to find pledges *de retorno habendo*.

11 G. 2.
c. 19. s. 23.

Besides these pledges, the sufficiency of whom is plainly discretionary in the sheriff, as he is made liable for their defect; it is elsewhere enacted, that sheriffs and others, having authority to grant replevins, shall take in their own names from plaintiff (*i. e.* the tenant) and two sureties, a bond in double the value of the goods distrained; such value to be ascertained on oath, conditioned to prosecute the suit with effect, and without delay, and to return the goods, if a return shall be awarded, before any deliverance be made of the distress; and the sheriff may assign such bond to the avowant, who may sue thereon in his own name.

Amongst the adjudications which have been founded on the above statutes, some of the principal are the following:

4 New Abr.
377.
Noy 156.

The sheriff did not return any pledges, and after issue was joined, and found, it was moved that they might be put in by the court's order after the verdict, and the court held that they might, notwithstanding

ing the said statute of *Westminster 2*, as before that statute the court might take pledges on the omission of the sheriff; and a diversity was made between the pledges for prosecuting which were at common law, and those *pro return. habend.* given by this statute; and the court held, that though upon the default of the sheriff, he was subject to the action of the party, yet the taking of pledges by the court did not make the judgment erroneous; and *query*, would it not clear sheriff from all danger from their insufficiency?

But it seems clear, that if the sheriff takes none, or insufficient pledges, plaintiff is entitled to his action, and also to a *sci. fa.* against the pledges on the judgment: but if plaintiff sues the sheriff in debt on the judgment, it is unnecessary to sue out a *sci. fa.* against pledges first, for the *sci. fa.* is only to certify the sufficiency of the pledges, who are already known to be insufficient by the declaration and verdict.

16 Vin Abr.
399.

An action on the case against a mayor for delivering cattle, on a replevin without finding pledges to make a return, if a return adjudged according to *Westm. 2*; he having taken a sum of money instead of pledges; and it was adjudged against him, and the court said, If he had taken but one pledge, and he had been sufficient, it had been well enough, but it is at his peril if the pledges are insufficient.

2 Lil. Abr.
255.
Cro. Car.
446.

PLEDGES in REPLEVIN.

If in an inferior court, the condition of the bond is, if "he prosecute his suit commenced, with effect, in the court of . . . and do make return if, &c." and it happens that the plaintiff hath judgment below, which is afterwards reversed by error in K. B. in such case, unless the party makes a return he forfeits his bond; for though he had judgment in the court below, yet the words "if he prosecute his suit commenced, &c." extend to the prosecution of the writ of error which is part of the suit commenced below; and in this case the taking of such bond was held to be lawful, and said to be the common practice.

Fitzg. 158.
Fortesc. Rep.
209, 210.

4 New Abr.
377.
Comb. 228.

In debt on a replevin bond taken by the sheriff, conditioned that if C. B. appear at the next county court, and prosecute with effect for taking, &c. and make a return, &c. and save harmless the sheriff, &c. then, &c. defendant after *oyer* pleaded, that at the next county court "*tent' tali die*," he did appear and prosecute, &c. until it was removed by *recordari*, and did save harmless the sheriff, but doth not say that no return. *habend.* was adjudged; on demurrer the court inclined for the plaintiff, for defendant should have said that no return was adjudged at all; and though he prosecuted to the *recordari*, yet return. *habend.* might be adjudged afterwards, and the condition goes to any adjudication of return.

It hath been adjudged, that a bond conditioned for the same as the recognizance of the pledges, had been void; although said to be of ancient use, and apparently within the statute of *Marlbridge*, which requires sureties, and such are the *obligors*; because it was to save the sheriff harmless, in making replevin by plaint, which he could not have done before the same statute.

4 New. Abr.
376.
Ray. 278.
2 Lutw. 686.

SECT. II. *How far these Pledges are liable.*

In an action on the replevin bond, common bail shall suffice:

Salk. 99.
Carth. 519.
Holt. 127.
12 Mod. 320.
380.

If the sheriff return insufficient pledges, they are no pledges within the statute, and the sheriff shall be chargeable, as if he had not taken any.

2 Lil. Abr.
454.
4 New Abr.
376.

If he returns the pledges upon the writ, if plaintiff be nonsuit, and upon the writ of *return. habend.* he returns *averia elongata*, the party may have a return of the beasts of the pledges. But if the deliverance be merely by plaint, because the pledges do not appear to the court, he can have no such writ. And if he returns *nil* on the writ for a return of the beasts of the pledges, then the party may have a *sci. fa.* against the sheriff, *quod reddat ei tot averia.*

Ibid.

The party may have *sci. fa.* against the pledges, where the suit is in any court of record,

4 New Abr.
377.

cord, though in a county court, &c. a *sci. fa.* will not lie against them, because these are not courts of record; yet there the party may have a precept in the nature of a *sci. fa.* against the pledges.

2 Lil. Abr.

455-
Skin. 244-

4 New Abr.

376.

2 Show. 421,

485.

Comb. 1. 2.

3 Mod. 56.

A replevin was brought by a plaintiff in London, and defendant found pledges to make a return, if a return should be adjudged; afterwards, and before any judgment, the record of the plaintiff and pledges was removed by *certiorari* into K. B. and upon a return awarded and an *elongata* returned, a *sci. fa.* issued against the pledges; they appeared and demurred thereto. It was insisted that the benefit of the pledges was lost, and they are discharged upon the removal by *certiorari*, which is no original; but if it had been by *recordari*, there it is said, *Et ad eundem diem presigas partibus*, &c. and afterwards, on great consideration, it was adjudged that the pledges are not discharged. See *West. 2. c. 2. & Sid. 215.*

END of the FIRST PART.



P A R T II.

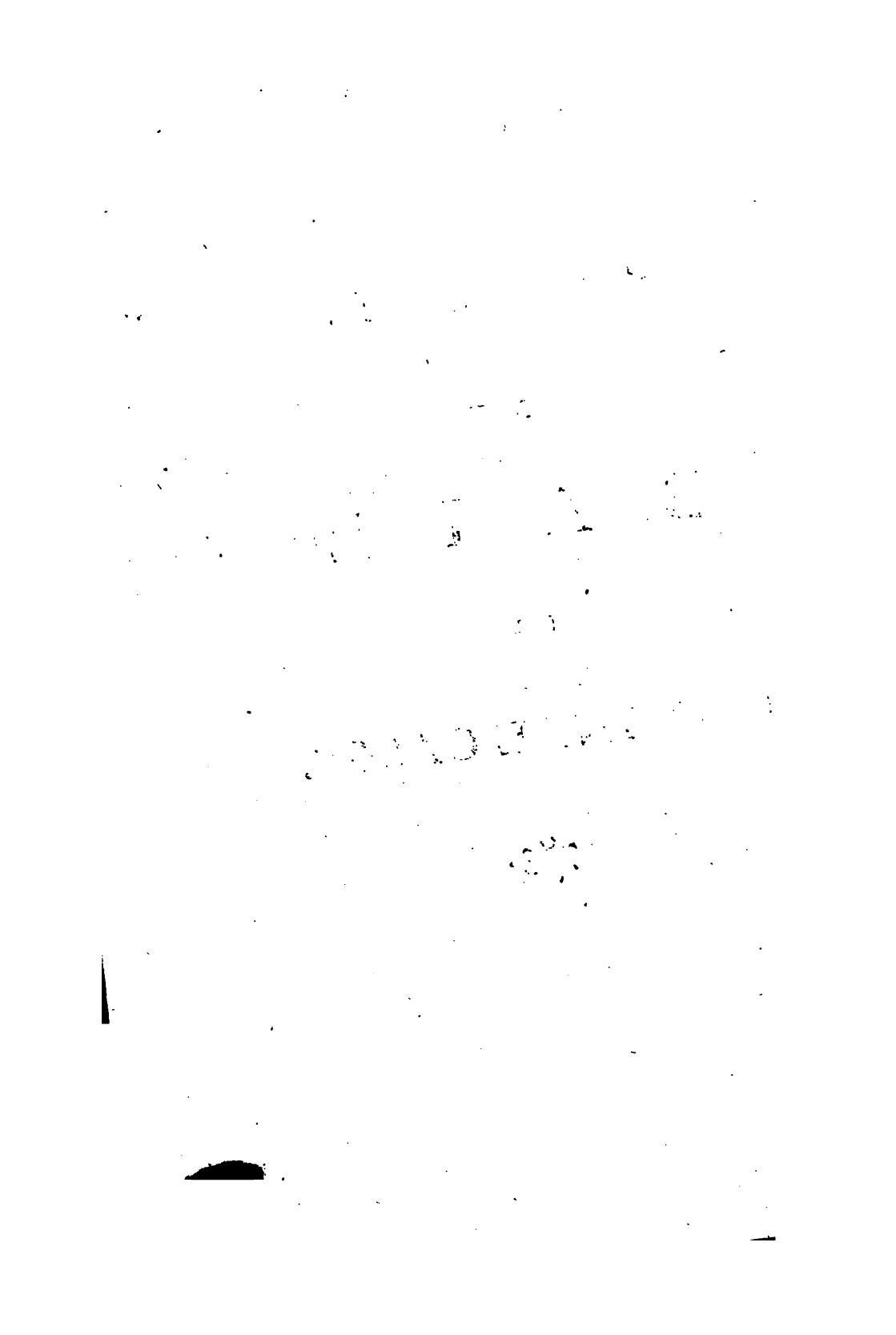
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B A I L

I N

CRIMINAL CASES.

1783.



ANALYSIS

OF THIS

SECOND PART.

OF BAIL in CRIMINAL CASES.

C. 1. In what cases BAIL is, and is not
granted.

- { 1. *What offences are bailable.*
 Of appeals.
2. *What offences are not bailable.*

L

C. 2.

**C. 2. Of the POWER of the MAGISTRATES,
and the COURTS, to grant or refuse
BAIL.**

- 1. *Of the power of the justices of peace.*
- 2. *The like of the justices of Gaol-delivery.*
- 3. *The like of the court of King's Bench.*
- 4. *The like of the other courts at Westminster.*
- 5. *The like of the Parliament.*

**C. 3. The PENALTIES incurred by a neglect
or abuse of this power.**

- 1. *Of granting BAIL where it ought to be denied.*
- 2. *Of refusing or delaying BAIL, when it ought to be granted.*
- 3. *Of taking insufficient BAIL; and herein what is sufficient BAIL.*

C. 4.

C. 4. How far these BAIL are liable.

1. *Of the nature of Recognizances, and herein of taking the BAIL.*

- 1. *Recognizance to prosecute.*
- 2. *Recognizance to appear.*

2. *Of their duty, privilege, and the extent of their obligation.*

3. *Of their discharge.*

C. 5. Of the CERTIORARI, and BAIL thereon.

C. 6. Of the HABEAS CORPUS, and BAIL thereon.

1. *The ACT recited.*

2. *Cases, where BAIL granted thereon.*

ANALYSIS.

C. 7. Of SURETIES.

{ 1. For the PEACE.

{ 1. *What it is.*{ 2. *When grantable, or not.*{ 3. *When a recognizance is forfeited.*{ 4. *How same is discharged, or superseded.*

{ 2. For the GOOD BEHAVIOUR.

PART II.

CHAPTER I.

IN WHAT CASES BAIL IS, AND IS NOT GRANTED.

* * The copious field which the above title opens to our view, has been traversed with much care; however, it is far from the truth, that all which might be said on so extensive a subject is here collected together; the student will be led on by the following extracts to search deeper, and build his researches on this foundation; he will find it satisfactory, that the road to greater acquirement is made plain before him; and by following the track, he will answer the end of the present work: the order naturally divides this chapter into two parts:

1. *Where bail is granted.*
2. *Where it is not granted.*

Each of these require very minute discussion, and therefore further recourse must be had to method, in order to elucidate the same.

SECT. I. *In what Cases BAIL is granted.*

* * As it would be a confusion to arrange under different sections, what persons are bailable, and what offences are under the same predicament; and as the books often mention the person instead of the offence, *et e contra*, so it has been thought convenient to class them together under one title of offences bailable; and the like as to those which are not bailable.

THE first and principal statute relative to bail for offences, and on which the subsequent decisions have been chiefly founded, is the following:

West. 1.

3 Ed. 1. c. 15.

1 & 2 P. & M.

c. 13.

After setting forth what offences are not bailable, the statute enacts, That those after-mentioned shall be bailed on their offering good security to the sheriff, for which he shall be answerable; and *that* without giving ought of their goods. Persons indicted of larceny, or of light suspicion, for petit larceny, that amounteth not to above the value of 12*d.* if not guilty of some other larceny
aforetime,

aforetime, or guilty of receipt of felons, or of commandment or force, or of aid in felony done; or guilty of some other trespass for which one ought not to lose life or member, and a man appealed by a *prover*, after the death of the *prover* if he be no common thief or defamed.

A *prover* is one who confesseth the felony, and undertakes to prove another guilty of the same crime, which if he does, he saves his own life; otherwise he shall be immediately executed. 2 Inst. 188.

Provers are notailable because they are guilty by their own confession; but one appealed by an approver, if of good fame, may be bailed during the approver's life. 2 Inst. 188.
Co. Bail. 5.

If a man be appealed by a *prover*, &c. he may be bailed after prover's death; so he may by parity of reason, if the approver waive his appeal, or be vanquished. 2 Haw. 98.
1 Burn, 146.

Sheriffs, coroners, &c. shall let persons to bail, taken in personal actions, or because of any indictment of trespass, upon reasonable securities, having sufficient in the county, the exceptions will be noticed in their proper place. *post.* 23 H. 6. C. 9.

This statute seems to admit, that for *manslaughter*, and all other homicides (*except murder or felonies*) the offender may be bailed by justices of the peace. But if in case of

L 4

man-

1 & 2 P. & M.
C. 13.
Wood 622.
2 Inst. 315.
Dalt. 420. 5.
H. P. C. 99.
101.
4 Inst. 178.

manslaughter, though it be *se defendendo*, and it does so appear to the justices, yet if the party accused confesses the fact, or it is apparently known that he killed another, he cannot be bailed. If it is uncertain that he was the slayer, and the charge is but *manslaughter*, he may be bailed; for the act supposes, that in some cases *manslaughter* is bailable by law; so in the case of felony.

1 New Abr.
219.

So careful are our laws of the liberty of the subject, that it is a rule in our courts that, in criminal cases, bail is regularly to be allowed in such cases *wherein it seems doubtful* whether the person accused be guilty or not.

Salk. 104.
2 Inst. 189.

All misdemeanors are bailable; bail is taken only where the matter *stat. indifferenter*, and not when the offence is open and manifest. And although a person be committed to be detained without bail or mainprize, yet if the offence be by law bailable, he that hath power of bailing may bail him.

2 H. H. 135.

1 Burr. 179.

A *barrator* is bailable, as appears by the warrant issued against him; which is, that he be brought before a justice of peace, there to answer the complaint, and to find sureties for his personal appearance at the next quarter sessions.

Co. Bail, c. 5.
2 Inst. 190.

All *accessories* before and after the fact are bailable, if there are not very strong presumptions

sumptions of guilt. *Principals*, suspected only of *burglary* and *robbery*, though indicted, may be bailed. H. P. C. 100.
Dalt. 421.
Wood 620.

The party accused of *trespass*, or in any offence below felony, must be bailable, unless ousted by statute, or unless judgment be given; for if one hath been indicted and convicted, and had judgment, he cannot be bailed. Wood 620.
H. P. C. 98.
101.
Inst. 4. 178.

He that hath *dangerously hurt* another, may go under bail till the party is dead. But for this the justice ought to be very cautious how he takes bail, till the day and year be past; for if the party die, and the offender do not appear, such justice is in danger of being severely fined; and the statute makes no distinction between such homicide as is malicious, and that which happens by misadventure or in self defence; and it seems agreed that justices of peace who have power, at this day, to bail a man taken on a *light suspicion of homicide*, cannot bail any such person for manslaughter, or even excusable homicide, if it manifestly appear, that he was guilty of the fact; let it be ever so plain, that it cannot amount to murder. H. P. C. 99.
Dalt. 420.
1 Haw. 138.
1 Burn, 142.
143.
2 Haw. 95.
105.
3 Ed. 1. c. 15.

“Guilty of some other trespass, for which one ought not to lose life or member.” It seems reasonable to qualify the generality of this 3 Ed. 1. c. 15.
2 Haw. 99.
2 H. H. 135.
1 Burn, 147.

this expression in the above statute, with this limitation, that such accusation ought to be either on a light suspicion, or else that the offence be inconsiderable, or that it be not excluded from bail by some special act of parliament.

1 Burn, 141.
H. P. C. 98.

If a person be brought before a justice, and it appears that no felony is committed, he may discharge him; but if a felony be committed, though it appears not that the party accused is guilty, yet he cannot discharge him, but must commit, or bail him.

1 Lil. Abr.
175.

Bigamy is bailable; but in the case here referred to, the offender had been committed by a justice, and was bailed by the court on return of the *ba. cor.*

Mirror, 74.

Those who are imprisoned for any fine, or other pecuniary penalty, or punishment, *are to be bailed*; but *query*, if this is the judgment of the court, it is as an execution, where no bail can be, unless it be "until such fine be paid."

Co. Bail, c. 5.
44 Ed. 3. c. 3.

One indicted or appealed of *rape*, may be bailed, yet that was no felony at common law till *Westm. 2. c. 34.* *Vide* Lord *Balti-*

4 Burr. 2179.

more's case.

Co. Bail, c. 5.

One indictment for *mayhem*, as cutting out tongues, and putting out eyes, is bailable.

Strat. 2.

A person qualifying himself after having listed, shall be deemed as on duty, and discharged as on common bail, (for any bailable offence.)

A

A prisoner remaining in custody, for any offence, one year and a day, and no prosecution against him, shall be admitted to bail. Stra. 5.

Sickness in some cases will render a prisoner bailable, for the preservation of his life; but this is not allowed, where it arises from his own act. Sir *W. Wyndham* and *Mr. Harvey's* case, who stabbed himself after commitment. And it has been granted after conviction, and before judgment. Stra. 4.
10 Mod. 334.
1 Stra. 9.

There is another case, where the court admitted a prisoner to bail, who was very ill, until he should be better; but he died in a few days after. Stra. 9.

Defendant was convicted for keeping an unlicensed alehouse, and was committed for a month; *see stat.* After he had lain a fortnight, he brought *certiorari*, and was admitted to bail, on the return; court being of opinion, that if the conviction was confirmed, they could commit him in execution for the residue of the time. Thus where a statute inflicts imprisonment, the court on *certiorari* may admit to bail, and after confirmation, imprison for the rest of the time. Stra. 531.

In *Earbery's* case it appears, that defendant having been indicted for writing a libel against government, for want of appearance was outlawed; whereon he moved the East. 9 Geo.
See Fortesc.
37.

court for a writ of *error*, which the Attorney General opposed, as not being allowed in the case of the crown, without the leave of the King.

The Attorney General moved this matter again at another day; when *Pratt*, Ch. J. and *Powys*, J. seemed to think that defendant in discretion ought *not* to be *bailed*; but *Eyre*, J. and *Fortescue*, J. were clearly of opinion, this was a case within the act of parliament for reversal of outlawries, and therefore he *ought* to be *bailed*; and cited 2 *Salk.* 504. that it was the resolution of all the judges in *England*, except *Price* and *Smith*, that the Queen could not deny a writ of *error*, but that it was grantable from right, and a principle of justice, (except in treason and felony;) and the true reason why a person outlawed for treason or felony cannot have a writ of *error*, without the King's leave, is, because it is a conviction; and then the culprit has forfeited all he has, to the crown.

On this the court unanimously thought it reasonable and just, that defendant should have a writ of *error*; and the attorney general immediately signed a warrant for a writ, and *consented* to his being *bailed to appear* accordingly.

De Castro was committed by an order of the secretary of state for being a *spy*, and having been imprisoned a year and an half, was admitted to *bail*, and no prosecution being had against him, he was discharged; a *ba. cor.* would not lie in this case, for he was an *alien*. Fortesc. 195.

* * Before the close of this section it may be well to shew wherein bail is granted in cases of APPEAL.

If any person charged as principal or accessory be acquitted at the King's suit within the year and day; the justices before whom he is acquitted, shall not suffer him to go at large, but either remit him again to the prison or else let him to bail, after their discretion, till the year and day be past. 3 H. 7. c. 14.

An *appeal* is an accusation of one against another to attain him of felony, by words ordained for it. This is always at the suit of the subject. It is the party's private action, prosecuting also for the crown in respect of the felony; and it is a lawful declaration of another man's crime, being felony at least, before a competent judge, by one that sets his name to the declaration, and undertakes to prove it upon the penalty that may ensue for the contrary. Wood 627.

Bract. 1. 3.
Kel. Brit.
c. 22, 25.

Kel. Brit. 16.

In cases of *appeal* brought by the plaintiff, in *felony*, within the year and day, he must find in full county, two sufficient pledges distrainable to the sheriff in whose bailiwick the felony was committed, that he will prosecute his appeal according to the law of the land. And if several be appealed, let two pledges to prosecute be entred, and the appeal to be separate against each person. Thus stood the old law; but in *Waite's case*, where several appeals were brought against the principal and accessories, the court resolved they should all abate but the first. If plaintiff makes default in appearance at the next county court, he may resume his appeal, on finding other pledges, so as he pray it within a year and a day.

Stann. P.C.

65.

4 Co. 47. b.

Mirror, 73.

Some appeals of mortal offences, although they are notailable by law, nevertheless they are suffered to be bailed, when they are brought into the gaol; as, — the appeals of murder, robbery, burglary, larceny, or out of prison, where it is found that they are wrongfully appealed; and for such cases was the writ *de odio et atia* invented. Those who are condemned to have corporal punishment, are not to be bailed; but it is otherwise of those who are imprisoned for a *fine*, or any other *pecuniary* penalty or punishment.

Appeals

Appeals of *murder* brought by a widow, 7 Jo. 210. and upon the return of the writ the appellee appeared, and it was prayed that the appellant might be admitted to prosecute *per attornatum*, and a warrant of attorney under her hand and seal was produced, and acknowledged by her in person (for otherwise it must have been proved) and thereupon she was admitted to prosecute accordingly, and the warrant was filed, and the appeal arraigned at bar in French; and the appellee being at the bar was arraigned by the clerk of the civil pleas, and pleaded Not guilty; and was bailed *corpus pro corpore*, to appear the last day of the term, *de die in diem*.

The appellant made his appeal in person, and gave pledges to prove his accusation; as appears by the following passage in *Fleta*, translated by the ingenious Mr. *Kelham* in his *Britton*—“ If the appellant be vanquished, he is to be committed to prison; but his pledges to prosecute shall not be amerced, and because he fought in maintenance of our peace, his punishment shall be mitigated; but if the appellant withdraw himself, then both he and his pledges shall be in the king’s mercy, and he besides committed to gaol.” Fleta, c. 34.
f. 33.
Kel. Brit.
p. 140.

Kelyng 90.

Salk. 62.

Dier. 42, 297.

2 Inst. 185.
10 Jac. Co.
Ent. 355.

Lisle was indicted for *murder*, and found guilty of *manslaughter*, the prosecutor appealed in murder, and the prisoner applied for bail. The court was much divided, and took time to consider, Whether one convicted of manslaughter could be bailed before he had his clergy. The case of *Dyer* 297 & 42. is, That he cannot be bailed; which may be admitted to be law, for tho' justices of oyer and terminer and gaol delivery might not bail in such a case, yet the *King's Bench* is not restrained from bailing by *St. 1 W. c. 15.* but hath a liberty of bailing by the common law, if the person be not attainted. And so was it done in this court, upon the like conviction of manslaughter, upon a trial at the bar: The court, without calling the party to judgment, took time to advise until the next term, and bailed the prisoner then to appear. Afterwards, at another day, it was questioned, whether the court could call *Lisle* to know what he could say, why judgment should not be given against him, and if he should demand the benefit of his clergy, allow it to him. And after argument at the bar, it was adjudged, that "forasmuch as there was a record of conviction returned to *K. B.* the court ought to proceed to judgment thereon, though there was an appeal returned to be commenced." For brevity's sake

like we must refer to the special reasons for this judgment given by the court. Suffice it to say, that the court did arraign *Lisle* upon the conviction of manslaughter, and he demanded his clergy, which being allowed to him, he read as a clerk, and was burnt in the hand.

It appears by this case, that a person convicted of manslaughter may be admitted to bail, although an appeal be brought and then depending.

Defendant was indicted for murder, and the trial coming on, the prosecutor alleged there had been great labouring of the jury, and did not proceed, but brought an *appeal*; and though the indictment did thereby still continue, yet it being the prosecutor's delay, defendant was admitted to bail; but *Crooke J.* said, If the labouring the jury had not been proved, peradventure he would not be bailed. Bull. 85.

In an *appeal of murder*; although the argument was not brought on in three years, the court would not admit defendant to bail without the appellant's consent, and for want of which prisoner was remanded. Stra. 403.

In the case of *Bambridge & another*, the court said, they would bail, in all cases after acquittal, on the indictment, unless the judge was dissatisfied with the acquittal. But if he be convicted of murder, and be pardoned on

Stra. 854.
See this case
itself.

the report of the judge, he cannot be admitted to bail in case of appeal; for the presumption is against him. Thus it seems decided, that if he be pardoned pending the appeal, he cannot in this latter case be bailed, but must wait the affirmance or disaffirmance of the judgment.

2 Stra. 858.
Hil. 3 G. 2.

But in a subsequent case of *Pyle v. Grant*; it is clear, an appellee is *not bailable*, if convicted on the indictment, although pardoned. The case was in an appeal of murder; it appeared that the defendant was convicted on the indictment, but pardoned on the report of the judge, and after issue joined on the appeal he moved to be *bailed*, which was refused, the presumption being against him; contrary to *Bambridge's* case. But a trial at bar being ordered this term, and the appellant having taken no step to bring it on, but upon the day appointed moving to put it off to a further day; the court took the appellee's own recognizance in 500 l. to *appear* the last day of the term, and ordered that nothing should be done as previous to the day appointed for the trial; that if there was a discontinuance, the appellee might take advantage of it; and the last day of the term he was *discharged*, the appellant not appearing.

2 Stra. 1203.

A special verdict on an indictment for murder was found at the *Old-Bailey*, and removed

moved to *B. R.* But before the argument, defendant obtained a pardon; which he pleaded on his knees, and it was allowed. On the part of the prosecution it was insisted that by 3 *H. 7. c. 1.*, *Bail* ought to be required for his appearance to answer an appeal; an affidavit being produced, that the brother and heir was beyond sea, but expected in time; and also that by 5 and 6 *W. and M. c. 13.* the court should take *security* for the good behaviour. But the court said, Kel. 25. that this case was not such as the act of parliament meant, and this being to subject the prisoner to a second trial, which he was not before, not being indictable till the time to appeal was elapsed, till this act gave such a prosecution; it was therefore to be construed strictly and confined literally to an acquittal by verdict on an arraignment at the king's suit; and it was material, that no instance could be shewn of requiring such bail on pleading a pardon. On the contrary, *Bowen* (in *Mich. 8 Ann*) was discharged without bail. Acquittal must be understood in a course of law, and not an interposition of the crown's mercy.

The other point as to sureties for good behaviour, was declined by the court, though the council for the prosecution refused to waive their demand, and the prisoner's coun-

fel had them ready; there having been no instance since making the act, and this being merely discretionary, and there appearing some favourable circumstances in the verdict.

Salk. 61.

If an appellee plead an *excommunication* in disability of the plaintiff, it seems they may bail him till plaintiff shall be absolved; for otherwise the appellee might live in prison for ever, without an opportunity of coming to his trial.

S. P. C. 72.
2 Haw. 106.

II. Cases where BAIL is not granted.

West. 1.
3 Ed. 1. c. 15.
and 1 & 2 P.
& M. c. 13.
2 Inst. 186.
2 H. P. C.
129.
4 Bl. Com.
295.

From the two principal statutes relative to bail in criminal cases, the following may be collected, as offences not bailable.

Justices cannot admit to bail—on an accusation of murder, treason, manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if an indictment be found against him. Those committed for felony, who have broken prison—persons outlawed—such as have abjured the realm—approvers, and persons by them accused—persons taken with the mainour, or in the act of felony—persons charged with arson,—persons excommunicated, taken by writ *de excom. capiendo*.

Others

Others are of a dubious nature, as thieves openly defamed and known—persons charged with other felonies, or manifest or enormous crimes, *not being of good fame*—accessories, &c. But as these are *discretionary*, they will be mentioned under that head.

In respect to persons *outlawed*, and those who have abjured the realm, Dr. Wood thus explains the above statutes: An *outlaw* in felony cannot be bailed, because he is attainted in law. For the intendment of the law in admitting persons to bail is, because it is uncertain whether the party is guilty or no, which cannot be said when one is attainted. But a person attainted by outlawry, may appear personally and plead *misnomer*, or alledge error, in avoidance of the outlawry, be it on indictment on appeal, and the *King's Bench* may bail him. Thus one cannot be bailed who is attainted by verdict as well as by outlawry. Outlawed and excommunicate persons seem to be put for examples only in the statute, implying, that all other persons under the like circumstances are excluded.

Taken with the mainour; i. e. with the thing stolen, as it were in his hands, and here *non stat indifferenter* whether the party is guilty or no.

Those who are in ward by condemnation, execution, *capias utlagatum*, or *excom. surety*

Ibid.

Wood 619.

2 Inst. 187,

188.

H. P. C. 101,

105.

Dalt. p. 421.

of peace, or committed by the command of the justices, and vagabonds refusing to serve according to the statute of labourers.

Co. Bail.

C. 5.

29 Aff. 44.

2 Blackerb. 55. 40 Ed. 3. c. 3.

A principal in murder is not bailable; an accessory is.

Stra. 1138.

A prisoner positively charged by one person with a robbery was not bailed, though several affidavits of an *alibi* were sworn and read; he must be remanded to take his trial (See *post*.) But error lies on the award to remand, where the court refused to bail.

Stra. 536.

Salk. 106.

1 Cro. 557.

Keb. 43.

Sid. 320.

2 Keb. 173.

Upon error of a conviction for a forcible detainer, which had been removed by *certiorari*, on the motion for bail, grounded on these cases in margin. It was urged, *e contra*, that in error to reverse an outlawry the court will take bail, but not to reverse a judgment on an indictment. At last the court refused bail, the offender being in execution for a fine, and having committed a very notorious breach of the peace in the heart of the city, though a long vacation was coming on.

27 Ed. 3. lib.

Aff. 3. pl. 10.

2 Blackerb.

55.

If a man is outlawed of felony, and one receives him, and entertains him after the outlawry, *he* is not bailable.

2 Blackerb.

54.

1 Haw. 29.

f. 23. 25.

Br. Abr. Tit.

Mainprize.

No. 11, 56,

57, 78.

Although *homicide et infortunium*, (*i. e.*) misadventure, or *se defendendo*, are not properly a felony, yet the justices of the peace cannot bail the party, he must be committed till the next coming of the justices of *Eyre*

or

or gaol delivery. It is said, this is at the discretion of the judges.

If a man be wounded in peril of death, the party who so wounded him, shall be arrested, and not admitted to bail until perfect knowledge had, whether he who is so hurt shall live or die.

2 Blackerb.
54.
West. 1. 3 E. 1
c. 15.
3 Hen. 7. c. 1.
2 Inst. 186.
Roll Rep.
Poph. 153.

268. pl. 43. Latch. pl. 2.

Sarah Salisbury moved for bail, and that her physician and surgeon might visit the prosecutor, whom she had stabbed with a pen-knife, when his wound was dressed; that they might testify to the court that he was out of danger, in order that they might bail her. But *per curiam*, There never was a motion of this nature, especially so early as this is; the course is for the friends of the party injured to lay his condition before the court, when they oppose the bailing; if they do not this, then we may order such an attendance for our own satisfaction; but at present the defendant has no right to demand it.

Stra. 547.

A man committed by the privy council is notailable. So if by the King's personal command.

1 And. 208.
but see How
P. C. V. 2.
B. 2. C. 15.
sect 66. and
1 Rep. 297.

seq. 16 Car. 1. c. 10. pt. 8. 1 Roll. Rep. 134. 219.

Sir *Nicholas Poyne* and his son were indicted for murder, and committed to the *Marshalsea*, without bail or mainprize.

2 Blackerb.
54.
Mic. 13 a. 1.
Bulst. 7. 113.
The 1 Rol. Rep.
268.

The *King's Bench* when Sir *Ed. Coke* was Ch. J. was moved to bail them, and it was refused : and *Coke* declared, that for the death of a man he would not bail any one.

Stra. 911.

1242.

Cites Salk.

104.

Murder is not bailable ; manslaughter is bailable : and although the coroner's inquest should return manslaughter, yet if the depositions to ground the motion, were murder, the court would not admit to bail ; and, *e contra*, if they amounted to manslaughter, and the coroner's inquest was murder, they would admit to bail.

Co. Bail. c. 5.
Cunn. Dict.
tit. Bail.

One indicted of conspiracy, *viz.* " that with others conspired falsely to indict another of murder or felony," by means whereof he was indicted, and afterwards convicted, shall not be bailed ; this was the resolution of all the judges on the question demanded by *Edward III.* as appears by 27 *Lib. Assiz.* 1.

1 Lil. Abr.
175.

One that stands indicted for felony or forgery, ought not to be bailed until he have pleaded to the indictment ; for the parties shall be conceived to be guilty of the crime until they plead ; and there is difference between criminal offences and civil actions.

27 E. 3. c. 1.
2 Lil. Abr.
342.

One committed on a judgment of *premunire* is not bailable.

Sid. 143.

Defendant shipped goods at *Brazil*, without paying the customs, but promised to pay them

them at *Lisbon*, and offering to sell the goods in *England*, the *Portuguese* ambassador complained to the privy council; and he still refusing to pay them, they committed him; and being brought up by *ba. cor.* he moved to be bailed, but it was opposed, because it might cause a breach between the two crowns; but the court inclined he should be bailed, and if the matter could be proved he might be indicted, but they prayed time to inspect the return before the filing it, and therefore he was remanded.

Accessories to felonies are not to be bailed, unless they be of good reputation; and it seems to be settled, that where there are strong presumptions of guilt, such accessories are not bailable by *stat.* 3 *Ed.* 1. c. 15.

2 Haw. 102.
1 Burn, 146.

When the statute ordains that an offender shall be imprisoned at the King's will or pleasure; there the prisoner cannot be bailed, till he hath redeemed his liberty by such fine or ransom, as shall be assessed by the King's justices in his courts.

Dalt.C. 167.
1 Burn, 147.

It seems that those who are taken upon fresh *bue and cry*, are not bailable, as being to be accounted amongst those who are under a violent presumption of guilt.

2 Haw. 98.

One indicted and found guilty of the death of a *man by misadventure*, as by casting

Co. Bail, c. 5.
cites 3 Ed. 3.
Corone 354.

ing a stone over a house, and by chance kill-
in a man, woman, or child, is not bailable.

Mirror, 74.

Those who are condemned to corporal
punishments, are not to be bailed ; but it is
otherwise, in case of fine and imprisonment.

12 Mod. 435.

One charged with buggery, is not to be
bailed.

4 Bl. Com.
315.

If a man be acquitted on an indictment
of murder, or found guilty and pardoned by
the King, still he ought not in strictness to
go at large, but be imprisoned or let to bail
till the year and day be past, by virtue of
3 Hen. 7. c. 1. in order to be forthcoming,
to answer any appeal for the same felony,
not having as yet been punished for it.

11 Geo. 2.
c. 19. s. 4.

Persons guilty of concealing or carrying
off from the premises goods distrained, un-
der the value of 50 *l.* on oath, or affirmation
of the landlord, before any justice of peace,
shall be adjudged to pay double their value ;
and on neglect or refusal to pay the same,
it shall be levied on their goods by distress ;
and for want thereof, the justice shall com-
mit to hard labour, without bail or main-
prize for six months, unless the money be
sooner paid. And the same order issues
against those who aid or assist.

7 Burn, 155.
Burr. Mansf.
399.

17 Geo. 2.
c. 5. s. 8.

Players unlicensed, &c. having no settle-
ment where they act, to forfeit 50 *l.* to be
levied by distress, and in default thereof,
to

POWER of the JUSTICES. P. II.

171

to be committed for a time not exceeding six months, without bail or mainprize.

But this power of granting or refusing bail, must be referred to the next chapter.

C H A P. II.

Of the POWER of the MAGISTRATES
and the COURTS, to grant or refuse
BAIL.

* * It was the intention to class all the following articles under the two plain heads of, casesailable, or not; and the reader will perceive this intention in the foregoing chapter; but it seemed more regular to divide them, and therefore in addition to those cases respecting the purport of this second chapter, the following may be perused.

SECT. I. *Of the power of the JUSTICES.*

SECT. II. *Of that of the justices of gaol-delivery.*

SECT. III. *Of that of the court of King's Bench.*

SECT. IV. *Of that of the other courts at Westminster,*

SECT. V. *Of that of the PARLIAMENT.*

Of all these in their several orders.

SECT.

SECT. I. *Of the power of the JUSTICES.*

WHEN a criminal is brought before a magistrate, and the evidence there examined is sufficient to warrant his commitment for the offence, in order to take his trial, the delinquent in inferior crimes shall be at liberty to find bail ; or in other words, Sir *W. Blackstone* says, where bail will answer the same intention as commitment, it ought to be taken ; but in felonies and other offences of a capital nature, there no bail can be a security equivalent to the actual custody of the person.

4 Com. 294. 1 R. 3. c. 3. The statute enacts, That many persons having been arrested and imprisoned for suspicion of felony, sometime of malice, and sometime of light suspicion, and so kept without bail or mainprize, the justices are empowered at their discretion to let such persons to bail or mainprize, in like form as though they were indicted thereof of record before the same justices at their sessions. But this statute, so far as it gives power to a single justice, is repealed by 3 H. 7. c. 3.

3 Hen. 7. c. 3. Two justices of the peace (1 Quo.) have power to let to bail persons suspected of felony, or othersailable by law, until the next quarter sessions or gaol delivery, and there shall certify the same in pain of 10l.

Justices

Justices of the peace cannot let to bail any which are forbidden to be bailed by *Westm. I. c. 15.*; and none arrested for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by law, shall be let to bail by the justices, but in open sessions, or by two justices (1 *Quo.*) at least being present at the time of such bailment; which shall be certified in writing, with the examination of the prisoner taken before the bailment at the next general gaol delivery under a penalty, &c.

1 & 2 P. & M.
c. 13.
2 & 3 P. & M.
c. 10.

Sir *John Kelyng* explains this statute further, and says, that all these recognizances and bailments shall be so certified into court before noon; for that they being kept longer out, it often happens, that felons and other offenders escape the prosecutor's witnesses, and parties being wearied out with delays and attendance, beside many other great mischiefs.

Kel. Rep. 1.

And the said justices have power to bind all such by recognizance, as do declare any thing material to prove the offence, to appear at the next general gaol delivery to give evidence against the party on his trial; and shall certify the same in like manner. But in *London* or *Middlesex*, and in other cities and towns corporate, the justices may let prisoners to bail, as they might before this act; but when they do, they must certify as above.

This

1 New Abr.
222.

This latter statute was occasioned by the justices of the peace having abused the former ones, in bailing in the name of *two*, where *one* justice only was present, and for offences not bailable; and therefore this statute declared what offences were bailable or not, with the above restrictions, which see before.

2 Haw. 105.

And hence it is that a justice of the peace, cannot admit to bail, unless for an offence directly tending to a breach of the peace, the restraint whereof is the chief end of his office; or for an offence by statute put under the cognizance of one justice, or for an offence indictable at the sessions.

3 Ed. 1. c. 15.

Amongst the persons bailable or not, others are mentioned to be of a dubious nature, and as such to be at the discretion of the justice, *viz.* thieves openly defamed and known; persons charged with other felonies, or manifest or enormous offences, not being of good fame; accessories in felony, not of good fame.

2 Haw. 99.

1 Burn, 144.

And on this statute it is thus commented: that thieves openly defamed or known, ought not to be bailed for any fresh offence, where there is any probable evidence against them. But this seems, in a great measure, to be left to the discretion of the person who has power to bail them; who, on consideration

tion of the circumstances of the whole matter, and the probabilities on both sides, if he finds it reasonable, strongly to presume them to be guilty, ought not to bail, but commit them.

So likewise "persons charged with manifest offences" in the same statute, seems to be understood of inferior crimes of an enormous nature, under the degree of felony; as, dangerous riots, exorbitant rescoufes, misprision of treason, *præmunire*, and such like heinous offences; yet it seems, in a great measure, to be left to the discretion, to judge in what cases the crime is so flagrant and enormous, that they ought not to have the benefit of the statute.

Thus every justice of peace has a discretionary power of admitting persons to bail, who have given a dangerous wound.

The authority given to one justice of the peace, by *Edw. 1. c. 15*, has already been mentioned; and although the subsequent statute of *Philip and Mary* has prescribed *West. 1.* as a pattern for justices to follow, in relation to bail, and it therefore follows, that a person under an actual arrest for any crime, declared to be irreplevisable by that act, cannot be bailed by any justice; yet, if a person at large be only accused of any such crime on a slight suspicion, before a justice

2 Haw. 99.

2 Haw. 103.

1 New Abr.

222.

2 Haw. 145.

1 & 2 P. & M.

c. 13.

of

of the peace, it seems, that the justice ought not to commit him, but ought to take surety from him, to appear before a proper court.

Rol. Rep.
268.
H. P. C. 99.
Dalt. c. 114.
Lamb. 346.
2 Inst. 314.
1 Haw. c. 63.
f. 19.

Also this latter statute, expressly mentioning the bailing of persons for manslaughter, as well as for other felonies, it is clear, that justices of the peace may, by force thereof, safely bail any person imprisoned on a slight suspicion of a fact appearing to be no higher an offence than manslaughter; and much more, if it appear to amount to no more than homicide by misadventure, or in self-defence; but the justices ought to be cautious, that the offence does not amount to murder; also that there are no violent presumptions that the party did the fact: for if any such appear, he ought not to be bailed, although it amount to no more than homicide by misadventure or self defence.

2 Blackerby
56.

1 Burn, 147.
2 Haw. 103.
Co. Bail, c. 6.
1 New Abr.
221.
H. P. C. 105.
Lamb. 347.

Burn mentions it as a general rule, That so far as any persons are judges of a crime, so far they have power to bail the offender: on which ground it seems clear that any two justices (1 *Quo.*) may of common right bail persons indicted at the sessions; because they may hear and determine the indictment. And also it hath been holden, that any one justice hath the like power; and this seems implied by 1 *Rich. 3. c. 3.* which, giving one justice power of bailing for felony, "in like form

form as if such person had been indicted at the sessions," clearly supposes, that if such persons had been indicted at the sessions, they might have been bailed by one justice. And if any such justice had such power before the statute, specially relating to the power of justices in granting bail, it seems that they have still the same power, in relation to persons so indicted of any bailable offence, under the degree of felony; because these statutes seem not to restrain them in any such case, under the degree of felony, from any power which they might lawfully claim before.

But it seems difficult to maintain the power of one justice to bail a person for any crime before indictment; unless by some statute it be limited to the cognisance of one justice, or be an offence directly tending to the breach of the peace; the bailing of persons for which, seems properly to come under their cognisance, as conservators of the peace.

2 Haw. 105.
2 Blackerly
53.

And Mr. Dalton says, if it is not in case of felony, it seems that any one justice alone may bail a prisoner, except where it is otherwise ordered in particular instances by some special statute. So afterwards

Dalt. c. 12.

The process, as well of *capias* as of *outlawry*, may be stayed by a *superfedeas* issuing

C. 193.
Burn. 4. 43.

N

from

from other justices out of sessions, testifying that the party hath come before them, and found sureties for his appearance to answer to the indictment, or to pay his fine.

Wood 622.
Dalt. 424.
H.P.C. 106.

Bail may be taken by two justices (1 *Quo.*) (others say by one only) after judgment and process issued thereon, in cases under felony, or in case of trespass or misdemeanor, wherein bail is not prohibited by a particular statute, But see 29 *Eliz. c. 5.* where one may appear without bail on a penal statute.

Ha. Pl. 102.

If a man be accused on light suspicion, but there is strong presumption, or the defamation be great, the justices may refuse to bail him. And this is also expounded, that they be of good fame.

2 Inst. 290.
1 Burn, 146.

2 Stra. 848.

Justices of peace in *England* may commit a person offending against a law in *Ireland*, in order to be sent over. This was in the case of *King v. Kimberley*, cited at large under the head of *Haheas Corpus, post.*— And there are several other instances of this practice in the books; but as the alliance between the two islands is of a different nature, at this period, query, how far this practice can be continued?

2 Blackerb.
Ca. 180.
See Haw.
P. C. c. 61.

Justices of peace have a discretionary power of binding to the good behaviour,

f. 4.

II. Oj

II. *Of the power of the justices of gaol delivery.*

Justices of gaol-delivery, not being within the restraint of *Westm.* 1. may bail persons convicted before them of homicide by misadventure or self-defence, the better to enable them to purchase their pardon.

1 New Abr. 223.
2 Crompt. 154.
H. P. C. 101.
F. N. B. 246.
S. P. C. 15.
2 Haw. 106.
H. P. C. 111.
Crompt. 153.
2 Haw. 106.

It seems in their discretion, to bail a person convicted before them of manslaughter on special circumstances; as, if the evidences were slight against him; or, if he had purchased his pardon.

And where such justices have power to admit persons to bail; they may do it as well after their session is over, as during the same.

2 Haw. 106.

But it was adjudged that they could not admit to bail persons convicted of manslaughter; but that it did belong to the *King's Bench* at their discretion.

Salk. 61.

They may admit to bail any person convicted of felony upon evidence, by which it appears plainly to the court that he was not guilty.

Crompt. 154.
2 Haw. 114.

III. *Of the power of the Court of King's Bench in cases of BAIL.*

This court, says Mr. *Bacon*, by the plenitude of its power, may in discretion admit persons to bail, though committed for crimes not bailable by those courts, on consideration of the nature and circumstances of the case.

1 New Abr. 223.
Vaugh. 157.
6 Mod. 73.
3 Salk. 91.
284.
Holt 590.
2 Ray. 978.
Ray. 381.

12 Mod. 162, 155, 156. 2 H. P. C. 112.

Kely. 90. And although not tied down to the rules
 Dyer 79. prescribed by *Westm.* 1. yet the court will
 Bulst. 87. not bail any person there declared to be irre-
 2 Haw. 114. plevisable, without some special motive to
 2 Inst. 185. induce the court to bail; as in cases of per-
 186, 189. sons attainted for felony, or notoriously guilty
 H. P. C. 104. of treason or manslaughter by their own con-
 1 Salk. 61. fession.
 3 Bulst. 113.
 5 Mod. 454.

5 H. 7. c. 16. And for any error in an outlawry, to re-
 2 Inst. 188. verse a judgment in an appeal of felony, the
 court will bail at discretion. So if a man
 H. P. C. 101. be convicted of felony upon evidence, by
 Sid. 316. which it plainly appears he is not guilty;
 this court, as well as the justices of gaol-
 delivery, have power to bail.

Kel. 90. By *Lisle's* case, namely, *manslaughter*, the
King's Bench has power to admit the offen-
 der to bail, although the justices of *oyer and*
terminer cannot.

3 Kin. 163. This court may bail for treason; and in
 all cases, where they cannot try the party.
 4 Bl. Com. And the court, or any judge in vacation,
 296. may bail for treason, murder, or any crime
 whatsoever, if they see good cause.

A commitment for treason generally with-
 out expressing the species of treason, is good;
 for the process is the same in one sort of
 10 Mod. 334. treason as in another. The court of *K. B.*
 have power to *bail* in high treason, notwith-
 standing the suspension of the *habeas cor-*
pus

pus act. And on affidavit made, that the prisoner was in such an ill state of health, that longer confinement would bring his life in danger, bail was granted. Lord *Montgomery's* case.

So likewise in *Bishop's* case, defendant ¹ Stra. 9. was convicted of printing a seditious libel, and appearing to be in a very ill state of health, was brought up, and moved for the judgment of the court, and to be admitted to *bail*; Ch. J. said, the offence is so great, that an adequate punishment may endanger his life, and to lessen the judgment would be an ill precedent; therefore *bail* him for the present, and we will give judgment when he is better; the defendant in 2000 *l.* and two sureties in 1000 *l.* each.

It is true the *stat* 3 *Ed.* 1. c. 15. only pre- ¹ Burn, 141. scribes who shall or shall not be let to bail by the sheriff; but by 1 & 2 *P. & M.* c. 13. it is enacted, that no justice or justices of peace shall let to bail or mainprize, any person not *replevisable* by 3 *Ed.* 1. And this is explained thus, the sheriff shall not replevy them by the common writ *de homine replegiando*, nor without writ, that is, *ex officio*; ² Inst. 189. but all or any of these may be bailed in ¹ Burn, 145. the *King's Bench*.

If a principal or accessory be acquitted ³ H. 7 c. 1. within the year and day, it is at the court's
N 3 discretion,

discretion to remit him or let him to bail, till the year and day be passed.

4 Bl. Com.

299

Skin. 683.

Salk. 105.

Stra. 911.

1 Com. Dig.

497.

1 Anders.

298.

Glanv. 114.

C. 1. c. 3.

The power of this court to bail in all criminal cases, according to the circumstances of the case, manifests the wisdom of our law; to allow bail to be taken commonly for such enormous crimes would greatly tend to elude the publick justice; and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man to prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case; except only to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament, so long as their session lasts; or such as are committed for contempts by any of the King's superior courts of justice.

23 H. 6. c. 28.

And. 298.

158.

Roll. Rep.

134. 192.

219.

Con. Moor

839.

P. N. B. 66. S. P. C. 72. Cro. Car. 507. 579. 593. 1 Rush. Col. 458.

By 13 *Car. 1. c. 16.* and 16 *Car. 1. c. 10.* where commitments by privy council do not with convenient certainty express the crime alledged against the party, he ought to be bailed.

2 Haw. 107.

But in a former very respectable authority it is laid down, that where the crime

is specified in the warrant, this court may bail persons committed by the King's special command, or by the order of the privy council; I do not find, says Serjeant *Hawkins*, but that wherever a commitment by the privy council hath specially expressed the crime for which the party hath been committed, this court has always admitted him to bail on the like circumstances, on which, in discretion, it will grant bail on other commitments: and wherever it has appeared that persons have been imprisoned by colour of an usurped authority, pretended to be derived from any patent whatsoever, contrary to law, it seems that the said court hath always discharged such persons so imprisoned without bail. See further.

5 Mod. 78.
1 Sid. 143.
1 And. 297.
298.
1 Leon. 70.
Palm. 559.

Thus having full confidence that both houses act within their jurisdiction, wherever it stands indifferent upon the return of a *ba. cor.* whether a commitment by either house were strictly legal or not, and the parliament be still sitting, I can find no precedent, says he, that the prisoner hath been bailed by the court of *King's Bench*.

2 Haw. 110.
3 Keb. 792.
1 Mod. 144.
4 New Abr.
224.
Carth. 131.
1 Show. 100.
2 Show. 330.

But this court may discharge any one committed for contempt of either house, after a dissolution or prorogation, whether he were committed during the sessions or afterwards, on account of the uncertainty of their meeting again. But Lord *Danby's* case is

2 Haw. 110,
111.
Keb 871. 887.
889.
Sid. 245.
Lev. 165.
Mod. 155.
157.
Carth. 132.
See §. in. 66.

mentioned as a proof that the court were of opinion that the commitment was not avoided by the prorogation; for they bound him to appear at the next session of parliament, which was a confirmation of the commitment.

Sty. 397.

But there is a case in *Styles* where bail was refused to a man committed by council and parliament for a seditious libel.

2 Haw. 111.
Show. 100.

Notwithstanding the contrary doctrine laid down in Sir J. Shower's Reports, yet it seems to be taken for granted in Lord Stafford's case, that this court may, in their discretion, bail a Lord upon an impeachment of high treason, which in that case they refused to do, not as a matter out of their power, but as a thing which they were not bound to do, and improper on consideration of the whole circumstances. And though the reasons cited by Shower, seem proper to prove, that the court of King's Bench cannot discharge a prisoner, from any impeachment in parliament whatsoever; yet they seem by no means to prove, that they cannot bail him. But it is observable, that it doth not clearly appear, from either of the above mentioned Reports, whether any parliament were sitting at the times of the motions for such discharge and bailment, or not; but it is certainly most likely to prevail in such a motion;

Raym 381.
Skin. 56.
162, 163.
Carth. 132,
133.

motion, when no parliament is sitting, nor expected soon to sit, and after the party hath been long in prison; because in such a case, if he should not be bailed, he might be perpetually imprisoned for a crime, without any opportunity of making his defence.

See further, *2 How. 111.*

If an offender be committed to prison, he may be removed by *hæ. cor.* to the King's Bench, which may bail him in all cases, unless bail is ousted by any particular statute. Wood 621. 2 Inst. 189.

Thus *Dunn* was committed (for assaulting a customhouse officer with a club, in the execution of his office) until the next quarter sessions, under the act of 13 & 14 Car. 2. c. 2. s. 11. f. 6. which expresses, that such persons armed with "clubs, or any manner of "weapon," who should forcibly hinder, abuse, &c. such officer, and such as shall act in their aid, shall be committed by the next justice of peace, or other magistrate to prison, there to remain to the next quarter sessions, &c.; the only question was, whether he was bailable? The matter is clear enough, though the court seemed to claim a discretion, for they said, this is not an application to our *discretion*; it is to be bailed *of right*; and a case was cited, where bail was admitted by consent, and so noted; but here the offender was remanded. 5 Burr. 2640.

In

5 Mod. 455. In cases of unreasonable delay of the pro-
 Sid. 78. secutor, of famine, of sickness, distemper, or
 Bulst. 85. where the life is in danger, this court has
 Palm. 558. power to bail.
 Keb. 305.
 Latch. 12.
 Cro. Ja. 356. Co. Lit. 289.

1 H. 5. c. 5. On a writ *de excommunicatione capiendo* de-
 5 Eliz. c. 23. fendant may be discharged from custody, on
 Godolph. putting in bail in this court; but sheriffs or
 c. 42. f. 25. justices of peace cannot take such bail: but
 Clergy. Vad. 149.
 Salk. 105, *Salkeld* cites a case, to shew that this was *de*
 294, 106, *die in diem*, and to render, if court should ad-
 134- judge the return good; while the return of
 Mod. Ca. the *ba. cor.* was under consideration of
 160. the court: and it is a rule that while the
 Fares. 56, 59, court are advising, they have discretionary
 61, 117, 134. power to admit to bail or not; and the court
 will refuse it if a false plea be put in.
 [See this case fully stated in chap. 6, f. 2,
post.

Bulst. 89. There is a case in *Bulstrode*, where, on a
 special verdict on an indictment for murder,
 the party was refused bail.

Sty. 371. A principal and his second in a duel were
 found guilty of manslaughter (for killing
 the antagonist) only by the Grand Inquest;
 and being brought to the bar to be arraigned
 for it, were denied bail.

2 Haw. 111. Bail have been admitted in many cases by
 Abr. Eq. 130. this court after informal commitments by
 1 New Abr.
 225. *Chancery,*

Chancery; but it seems now that each court will put the most favourable construction on each other's proceedings, and not intend that they acted beyond their jurisdiction.

A commitment from *Chancery* for disobedience of a decree, is adjudged to be good, without shewing the decree.

Mod. 155.
Moor 840.

This court, having the supreme controul over all inferior courts, may in discretion admit persons to bail, convicted by such courts, on conviction of the whole circumstances of the case; of which the court will receive information by suggestion, or affidavit, being consistent with the return of the *ba. cor.*

Vaug. 157.
6 Mod. 73.
3 Salk. 91.
284.
Holt 590.
2 Ray. 978.

One counterfeited a statute merchant, put a seal to it, and sued out execution, and took a seal from an old patent and put it to a protection; for which he was indicted, and was not bailed.

2 Black. 55.
40 Ed. 3. 3 lib.
Ass. pl. 33.

IV. *Of the power of the other courts at Westminster in respect to BAIL.*

The courts of *Common Pleas* and *Exchequer* at any time during the term, and the *Chancery* in term or vacation, may by the common law award *ba. cor.* for any person committed for a crime under the degree of felony or treason: and thereupon discharge him, if it shall plainly appear by the return that

1 New Abr.
226.
2 Inst. 53, 55.
615.
4 Inst. 290.
Vaug. 154.
2 And. 297.
Dalison 81.
2 Jo. 13, 14.
2 Mod. 198.
2 Haw. 115.

P. II. POWER of the PARLIAMENT.

that the commitment was illegal; or, bail him, if doubtful. And in some cases, the *Chancery* may bail for felony.

And by the *ba. cor.* act, any of these courts in term time, and any judge in vacation being of the degree of the *Coif*, may award *ba. cor.* for any personailable within the intent of that act, for any crime under the degree of felony.

V. *Of the power of the PARLIAMENT respecting BAIL.*

4 Bl. Com.
296.

Under this head we may observe one general rule, that either house of parliament, during their session, can bail any person by them committed, or such as are committed for contempts by any of the King's superior courts of justice.

CHAP. III.

Of a NEGLECT or ABUSE of the MAGISTE-
RIAL POWER.

* * Having represented the power of the magistrate and the courts, in granting and refusing bail, it may be well to say, that great caution is requisite in this particular; and therefore it is the design of this chapter to shew briefly, the penalties which are incurred by

SECT. I. *Granting BAIL, where it ought to be denied.*

SECT. II. *Refusing or delaying BAIL where it ought to be granted. And of*

SECT. III. *Taking insufficient BAIL.*

SECT. I. *Of granting BAIL where it ought to be denied.*

IF Sheriff, or any other, let any go at large by surety, that is not replevisable, if he be sheriff or constable, or any other bailiff of fee who hath the keeping of prisons, and be thereof attainted, he shall lose his fee and office for ever; and if an under sheriff, constable or bailiff, of such as have

fee for keeping prisons, do it contrary to the will of the lord, or any other bailiff being not of fee, they shall suffer three years imprisonment and fine at the King's pleasure.

27 Ed. 1.
(stat. de finibus levatis,
c. 3.)

That justices of assize, when they deliver gaols, &c. shall inquire if the sheriffs, or any other, have let out by replevin prisoners not replevifable, or have offended in any thing contrary to *stat. West* 1. and shall punish all such offenders according to that statute,

4 Ed. 3. c. 2.

That at the time of the assignment of keepers of the prisons, mention shall be made, that such as shall be indicted or taken by them shall not be let to mainprize by the sheriffs, nor by none other ministers, if they be not mainpernable by law; and to punish the said sheriffs, gaolers and others, if they do any thing against the said act.

1 & 2 P. & M.

That no justice or justices of peace, shall let to bail or mainprize, any person declared not replevifable by *West* 1. And that the justices of gaol delivery, of the place where such justice was guilty of that offence, shall, on examination and due proof thereof, fine him as they shall think meet.

Kel. 3.

Sir *John Kelyng* adds, on this head, with some degree of asperity, that if any justice of the peace shall take bail where he ought not, or wittingly or willingly take insufficient bail, and the party appear not, the
said

said justice shall not only be proceeded against according to law, but likewise be complained of to the Lord Chancellor, that he may be turned out of his commission.

It has been held also, that this is punishable, as a negligent escape, at the common law; or as an offence against all the above statutes.

H. P. 97.
2 Haw. 89.
S. P. C. 33.
1 New Abr.
227.
2 Blackerby,
54.
1 New Abr.
228.
Poph. 96.
Dalt. c. 114.
2 Haw. 90.

Justices of peace before they bail a man under commitment, must, at their peril, inform themselves of the cause for which he was committed; for if he were, in truth, committed for a cause not bailable by law, it is no excuse that he did not know he was committed for such cause.

Upon an assembly of all the judges, it was resolved by them, and agreed to be put in execution in all circuits, that if a man taken for felony be examined by a justice of peace, and it appears that the felon is not bailable by law, and yet the justice commits him to jail only, upon suspicion of felony, not making mention of any cause for which he is not bailable; and he is brought before two other justices, who not knowing of any matter why he ought not to be bailed, do bail him, these justices ought to be fined by the statute, for they offend if they bail him, who by *Westm. I. c. 13.* is not bailable; and

2 Blackerby,
55.
1 & 2 P. & M.
c. 13.

therefore

therefore they, at their peril, ought so to inform themselves of the matter before they take bail, that they may be well satisfied that such an one is bailable by law; and therefore they are to observe well the statute, *Westm. 1. c. 15.* who is bailable, and who is not, by the law. See Lord Coke's *Treatise of Bail and Mainprise*, before *Coke upon Lit.*, which was wrote on purpose for justices of peace.

Poph. 96.

2 Blackerby,
57.

Again, where a justice of peace took a recognizance of 10*l.* from his son, and 5*l.* a-piece from two sureties, to appear at the next assizes, the son having dangerously wounded a man, who died before the assizes, the justice was fined 200*l.* for taking bail. The same justice of peace was fined 200*l.* for giving a challenge, it being against his oath, to do any thing which may tend to a breach of the peace.

Stra. 1216.

In the case of the King *v. Clarke*, defendant, as a justice of *Surrey*, committed a man for stealing a mare, and bound over the owner to prosecute. Afterwards, upon examining two other persons, he admitted the party to bail; the prosecutor appeared at the assizes, and grand jury found a bill, but the offender did not appear; and the court granted an information against the justice,

justice, declaring, they should not have bailed the man themselves.

* But inasmuch as it is necessary, for the protection of the public, that bail should not be improperly allowed; so is it likewise important that the liberty of every man's person, in which there is a sacred privilege, should not be infringed for an offence, which does not in its nature carry with it so great an atrocity, as to endanger his life, and therefore to render his person the only proper security for his appearance; and for this cause, it is the business of this next section to point out

II. *The penalties of refusing or delaying BAIL where it ought to be granted.*

This is an offence at common law, and by statute also; it is punishable by suit of the party, or by indictment; but it is the duty of the party to find his sureties himself, and is justly committed till he finds same.

1 New Abr. 228.
2 Inst. 191.
H. P. C. 97.
3 Haw. 90.
Dalt. c. 114.
14 H. 7. 7.
Sty. 182.
4 Blacker. 57.

The statutes relating hereto are the following:

That if any withhold prisoners replevisable after they have offered sufficient security, shall pay a grievous amercement to the king:

West. 1. c. 15.

king: and if he take any reward for the deliverance of such, he shall pay double to the prisoner, and shall also be in the great mercy of the king.

27 Ed. 1.
C. 3.

This has been already cited in another place. And

31 Car. 2.
C. 2.

Must be referred to the chapter on the *habeas corpus: post.*

1 W. & M.
ft. 2. C. 1.

Excessive bail must not be required; though what shall be called excessive, must be left to the courts, on consideration of the circumstances of the case.

3 Bl. Com.
294.

III. Of taking insufficient BAIL, and hereafter of What is sufficient BAIL.

* * Bail being nothing more than a security for the appearance of an offender, that justice may take its proper course in chastising his offence; it is necessary that a due attention be paid to all matters bailable, so as to make the security taken, of consequence sufficient to prevent the offender's absconding; for when the one be found on comparison to be so far inferior to the other, that it is better worth his while to elude justice, he may indemnify the bail against their recognizance by a sum of money, and so bid defiance to law; to remedy which heinous aggravation of the

the

the offence, the following matters are necessary for study and enlargement.

If the party, bailed by insufficient sureties, do not appear according to the recognizance, the justice is finable by the judges of assize; but if the prisoner do appear, he is safe; and if he finds himself imposed on in taking insufficient bail, he may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on refusal, for that insufficient sureties are no sureties; and may examine them, on oath, as to their sufficiency.

H. P. C. 97.
2 Haw. 89.
S. P. C. 333.
1 New Abr.
226.
Kel. 3.
3 Bl. Com.
295.

2 H. H. 125.

Taking insufficient bail wittingly is likewise punishable by the several statutes before cited.

Wood 622.
West. 1.
C. 15.
27 Ed. 1. c. 3.
& M. c. 13.

4 Ed. 3. c. 2. 1 & 2 P.

Thus if a justice admit a person to bail by insufficient sureties, whom he knows not to be bailable by law, corruptly for lucre or reward, the court of *King's Bench* will grant an information against him, or it is such an offence for which he may be indicted.

1 New Abr.
227.

What is to be deemed sufficient BAIL.

No person shall be bailed for felony by less than two sureties; and it is said not to be

1 New Abr.
226.
2 Haw. 88.
H. P. C. 97.
Dalt. c. 14.

O 2

usual

usual for the *King's Bench* to bail a man on a *habeas corpus*, on commitment for treason, or felony, without *four* sureties; the sum in which they are to be bound, ought never to be less than 40*l.* for a capital crime; but it may be higher in discretion, on consideration of the ability and quality of the prisoner, and the nature of the offence; and the sureties may be examined on oath concerning their sufficiency, by him that takes the bail.

z Haw. 89. But justices must take care that, under pretence of demanding sufficient surety, they do not make so excessive a demand as in effect amounts to a denial of bail; for this is looked upon as a great grievance, and is complained of as such by 1 *W.* and *M.* sess. 2.

C H A P. IV.

How far BAIL in CRIMINAL CASES
are LIABLE.

* * From the foregoing observations, it seems that it has been made clear, in what cases bail is not grantable; and what is to be considered as the duty of the magistrate, and the *quantum* of their sufficiency; all which naturally seem to lead us to the present head of this work, wherein

wherein the offender is supposed to be bailed; and the bail should therefore know in what predicament they stand: which may be considered under the following heads;

I. *Of the nature of their recognizance, and herein of the taking the BAIL.*

II. *Of their duty, privilege, and the extent of their obligation.*

III. *Of their discharge.*

I. *Of the nature of the recognizance, and herein of taking the BAIL.*

The recognizance taken by the bail before a justice of the peace, is in separate sums for the principal and his bail, and is binding on their lands and tenements, goods and chattels, if the offender, or the persons bound, make default in performance thereof; for they do each of them acknowledge to owe a certain sum to the king, to be levied on their lands and goods for the king's use, if default be made in the condition; but it need not be signed by them.

Barl. Recog.

And although the power of the justices extends not beyond the limits of their own county, yet it is said that recognizances and informations voluntarily taken before them in any place, are good.

3 Burn, 14.
2 Haw. 37.

P. II. RECOGNIZANCES to prosecute.

But it will be better to divide this matter into

1. *Recognizances to prosecute.*
2. *Recognizances to appear.*

1. *Of Recognizances to prosecute.*

1 Burn, 221.
9 G. 2. c. 22.

A sufferer under any of the offences in the Black Act (all which are felony, and therefore not bailable), if he know himself, or can find any other who does know the offender; he shall, on examination and confession thereof before a justice of the peace, be bound in recognizance to prosecute the offender by indictment or otherwise, according to law.

4 Burn, 59.
Dalt, c. 186.

And this recognizance is a bond of record made to the king, by the parties complaining, under a penalty "to appear at the next quarter-sessions of gaol-delivery, and there prefer a bill of indictment for the cause charged, and give evidence to the grand jury; and if they find the bill, then to give evidence on the trial."

The penalty is incurred by a default, and the judge may estreat their recognizance, But on performance of which, it becomes void; and the lands and goods are recognizable, as appears by the acknowledgment.

Dalt, c. 186.

It cannot be taken but by a judge or officer of record; and by intendment only of law;

law; wheresoever the statute empowers him to cause a man to do any act, there he may bind the party by recognizance to do it, and on refusal to commit him to gaol. Crom. 125.
Dalt. c. 168.

But he cannot take recognizance for any other matters, but of such as concern his office; and if he doth, it is void.

2. *Of Recognizances to appear.*

In recognizances of bail, in cases of felony, where admitted in the *King's Bench*, each undertakes in a certain sum that the prisoner "shall appear at a certain day, before the justices at the next quarter sessions of gaol-delivery for the county, to answer for the felony specified, with the suspicion whereof he stands charged, and to do and receive what shall be there enjoined him, and shall not depart without licence." Cuna. Dist.

It is at the justices discretion, in admitting any person to bail for felony, to take the recognizance in a certain sum, or body for body; but for a crime of an inferior nature, the recognizance should only be for a sum; and the bail are to be bound in double the sum in which the criminal is bound. 2 Haw. 115.

If the recognizance be to appear at the assizes or sessions, it may be taken by any justice of the peace. 1 Lil. Abr. 417.

Kel. 3.

A recognizance to appear is never given up by the justice of peace, but is returned and filed at the next sessions.

10 Mod. 152.

If the recognizance be to *answer* generally, it includes all crimes the party shall be charged with; if it had relation to any particular crime, it should have been specified in the recognizance; the bail are bound in a certain sum, and do not, as in civil cases, stand in the place of the principal. And though one information shall have been commenced, and a *nolle prosequi* be entered for some defect in the pleading, this is no bar or discharge to the recognizance which is general, and leads to other offences.

3 Bl. Com.
295,
2 H. P. C.
127.

Bail may be taken in court, or in some particular cases by the sheriff, or coroner, or other magistrate, but most usually by the justice of peace; regularly in all offences, either against the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless prohibited by some special act.

II. Of their duty, privilege, and extent of their obligation.

The principal duty of the bail is, to see that the recognizance be fulfilled, by
3 causing

causing their principal to prosecute, or to appear, as the case may be, at the time and place specified; and to effect this, there is a like power, as in civil cases, conjoined with their duty, of seizing upon his person at any time, on *Sundays*, or at any place, or to carry him to a justice, to find new sureties, or be committed in their discharge. And here they may call in the assistance of the sheriff, and any of his officers to be aiding and assisting therein, and then surrender him to the county jail: And in default of his appearance, the recognizance is estreated, and the bail become liable for the sum therein. And judge *Hale* says further, that the bail are liable on the non-appearance of the offender, to be fined beyond their recognizance, if there be cause.

Where a person actually present in court, is bailed for a crime punishable with loss of life or member, it seems to be in the discretion of the court, to take a recognizance from each of the bail, either in a certain sum, or body for body, or both ways: but it is * a mistake to think that *body for body* doth make the bail liable for

* So saith the Mirror. It is abuse to thinke the same punishment is to be to mainepriors, as to principals who make default, whereas they are amerciable onely in courts. See Mirror 250. 4 Inst. 178,

6 Mod. 231.
12 Mod. 275.
348. 606. 7.
667. Ray.
706. 1 Rel.
Rep. 99.

Kel. 2.

H.P.C. 154.

1 New Abr.
230.
2 Jo. 210.
Lev. 106.
Sid. 211.
4 Inst. 178.
2 Stra. 911.
1242,
2 H. H.P. @
125.
H. P. C. 97.
Crompt.
Inst. 157.
Wood 618.

2 Haw. 115. the same punishment as the prisoner, but only to be fined, &c. And justices of the peace may take recognizances in this form.

Ibid. But for a crime of an inferior nature, it seems the recognizance ought to be only in a certain sum of money, and not *body for body*.

Ibid. And it appears by the same authority, that the court may dispense with the principal's joining in the recognizance.

Ibid. 116. If the recognizance be, that the prisoner shall appear in the court of *King's Bench* to answer to an information, and not to depart till discharged by the court, and afterwards *arrestus prosequi* is entered on that information, and another exhibited, where to he refuses to appear, the recognizance is forfeited.

Kel. 2. If the offenders appear not upon their recognizances the first day, the default is to be recorded, and the recognizances to be forfeited; nevertheless, processes or warrants, as the case shall require, to go out against them and their bail; so likewise, as to those who are bound to give evidence; that if possible the business be not deferred to another session, in which time commonly the prosecutors and witnesses are taken off, and the matter compounded.

It seems that the bail are not liable for any contumacy by the principal on his trial; as, if he stand *mute*; although their recognizance is that he shall *answer*, &c. : and they fully perform their obligation; if they produce him in court according to their recognizance, which thereby answers the full end of law, as if he had never been out of actual custody.

1 New. Abr.
231.
2 Inst. 150.
4 Inst. 178.
S. P. C. 178.
Dalt. c. 127.
2 Haw. 115.

If a criminal be admitted to bail on an indictment, and likewise in a civil action, and surrender himself to the *Fleet*, in discharge of his bail in the civil action, and then moving by *ba. cor.* to the *King's Bench*, and thence escape; the bail to the crown shall suffer by their recognizance being estreated, for they cannot pretend he was taken out of their custody by his commitment to the marshal, for they must take care of him there, and they might have had him committed in discharge of themselves.

Salk. 205.

A recognizance had been forfeited, and sheriff had levied 20*l.* on the goods of one bail, and returned that the other had nothing whereof, &c. The motion was to tax costs, and that the same be paid to the prosecutor out of the sum levied. A rule was granted to defendant and bail, to shew cause why costs so taxed should not be paid to the prosecutor, and the surplus returned to the person

4 Burr. 2119.

on whom levied. This was recommended by Lord *Mansfield* as the easiest method ; for it is not the King's money, he has no interest in it, he is only royal trustee for the party.

If a principal do not appear, and the recognizance be forfeited, and paid by the bail ; yet the principal shall remain open and liable to the law whenever he can be taken, for the penalty in the recognizance is no other than as a bond to compel the bail to a due observance thereof, and has no connection with the principal ; they could not sue him thereon, for money paid to his use, or on his account, for it was paid on their own account, and for their own neglect ; but having paid it, they are wholly exonerated, though the offender remains liable for his offence.

III. Of the BAIL's discharge..

1 Will. 3. 15.

If the principal be acquitted, the bail are discharged. But *query*, as their duty is only to produce him at the time of trial, how can any subsequent matter affect them one way or the other ? Bail for his appearance, are not bail for the event of his trial, nor for any fine laid upon him.

1 Burr. 10.

2 Stra. 1165.

A common law recognizance to remove an indictment from the court of *Oyer and Terminer*, at *Hick's-hall*, not within 5 & 6 W. & M. c. 11. s. 2. shall be discharged

on

on the terms of it being complied with, without costs; *à contra*, to remove an indictment from quarter sessions, if the prosecutor be a civil officer; but no costs, if prosecutor be not the party injured. 1 Burr. 54. 431.

But the judges of *Oyer* and *Terminer* are the proper judges, whether recognizances ought to be estreated or spared; and it is for the advantage of publick justice, that they should have such power if they see fit. 10 Mod. 278.

And by parity of reason it should seem, that the justices of peace in the quarter sessions, should have the like power in respect of offences cognizable there; and in case they shall be estreated, where the offence is not attended with aggravating circumstances, the statute 4 G. 3. provides for the discharge out of custody, of all such who have been imprisoned on account of such forfeiture, by affidavit and petition to the barons, without any *quæstus*; the party paying for their order no more than 1 l. 1 s. 4 G. 3. c. 10.

But no discharge to be given on such petition, where any debt is due to the crown, other than by said recognizance; or in cases of defrauding the revenue by a contraband trade, or assaulting the officers of the customs or excise, or any person assisting them.

A motion, *by consent*, was made to discharge a recognizance for an appearance; the court said they could not; but would release spite 11 Mod. 200.

cognizance from defendant to carry down the record to trial, the same term, on which the *certiorari* was returnable, or the sitting afterwards; and on removal from other counties, such recognizance was required for a trial at the next assizes.

But subsequent statutes have made further provisions in this matter:—

5 & 6 W. & M.

c. 11.

8 & 9 W. 3.

c. 33.

3 G. 2. c. 19.

1 Burn, 308.

That on granting a *certiorari* to remove an indictment or presentment, all parties indicted prosecuting such *certiorari* shall, before the allowance thereof, find two sufficient manucaptors, who shall enter into a recognizance before a justice of the *King's Bench*, (who shall indorse the same on the writ), or before a justice of the peace of the county or place, in 20 l; with a condition, at the return of the writ, to appear and plead to the indictment or presentment in the *King's Bench*; and at his own costs and charges to cause issue to be joined thereon, or any plea relating thereto, to be tried at the next assizes for that county after such *certiorari* shall be returned, or the next term if in *London, Westminster, or Middlesex*, unless other time or place be appointed by the court, and to give due notice of trial to the prosecutor; and to appear, from day to day, in said court, and not to depart until discharged by the court. Such recognizances

to

C H A P. V.

Of the CERTIORARI, and BAIL thereon.

THIS writ is brought to remove an indictment from the court wherein it was found, into another wherein it may be tried; and the following extracts will shew how the law stands respecting bail on this writ.

It is enacted, That before the allowance of any *certiorari* for indictments of riots, forcible entry, assault or battery, defendant shall become bound (to prosecute same) in 10 *l.* with such sureties as the justices of the quarter sessions shall think fit, to pay such prosecutor such costs and damages as the justices of the county, &c. shall think fit; and in default thereof, it shall be lawful to proceed on such *certiorari* notwithstanding.

And the like recognizance, in 40 *l.* is required by a subsequent act, on *certiorari*, for indictments thereon concerning highways.

These statutes do not extend to all indictments at sessions in general, but only to those particular ones therein mentioned; but this defect was, in a great measure, supplied by the rules of the court of *King's Bench*, which, on removal of an indictment from *London* to *Middlesex*, required a recognizance

21 Ja. 1. c. 8.
f. 6, 7.

4 New Abr.
352.

13 & 14 C. 2.
c. 6.

4 New. Abr.
352.
Keb. 225.
2 Salk. 526.
2 Haw. 291.

March 27. That if persons, offering to be sureties,
 2 Haw. 292. appear to be worth 20*l.* the justices cannot refuse them.

Ibid. That if there be several defendants, and some find sureties and others not; the indictment shall be removed as to those, at least, who find sureties, because they shall not be prejudiced by the fault of others; but as some say, it shall be removed as to all.

Salk. 170. That notwithstanding the condition of the recognizance be, that defendant shall procure a new trial at the next assizes; yet the recognizance shall not be forfeited, unless the prosecutor gives rules according to the course of the court. And,

Salk. 380. That after it be forfeited for not procuring a trial, &c. no motion shall be made to quash the indictment.

Salk. 106. Upon error of a conviction for a *forcible*
 1 Sid. 286. *detainer*, bail was refused to defendant. —
 2 Keb. 43.

The case was: *Layton* and *others* were committed by the Lord-mayor of *London* upon his view, for a forcible detainer, and fined 100*l.* and committed in execution, and the record of the conviction was removed by *certiorari*; and the defendant brought a *writ of error coram nobis*, and assigned error in person; and now it was moved they might be bailed. *E contra*, it was urged, that in error
 See 1 Cro. 557.
 Sid. 320.
 2 Keb. 173.
 Keb. 43. to

to reverse an outlawry the court will take bail, but not to reverse a judgment in an indictment. At last the court refused to bail him, being in execution for a fine, and having committed a very notorious breach of the peace in the heart of the city, though a long vacation was coming on.

On removal by *certiorari* of an indictment from sessions of oyer and terminer, defendant, and his bail, entred into a recognizance of 500*l.* to plead, go to trial, and appear on the return of the verdict; he did so, and received judgment. On motion to discharge recognizance, it was insisted he should pay costs; but this not being in 20*l.* the sum required by the statute,—the court held, it was a recognizance at common law, and having been fully performed, by his appearance, was discharged with costs. Stra. 1165.
5 & 6 W. &
M. c. 11.

On a recognizance on *certiorari* (in pursuance of 5 and 6 *W. 3. c. 11. s. 2, 3.* made perpetual by 8 and 9 *W. 3. c. 33.*) where defendant had paid, on conviction, one third of the fine; it was adjudged that the prosecutor could not be intitled to that and his costs also; and ordered the costs to be taxed, and the sum received to go in part payment thereof. 4 Burr. 2126.

If the prosecutors are the party injured, the recognizance shall extend beyond the

Burr. Mansf.
54.

fine, if any adjudged, to the payment of their costs; but if they are only informants, the recognizance is discharged as soon as the fine is paid. And if they be civil officers, they shall have their costs before the recognizance be discharged.

This has also been mentioned before, as it applies to common recognizances.

4 New Abr.
356.
Cro. Ja. 282.
Yelv. 107.
Skin. 244.
2 Haw. 292,
294.
2 Roll. Abr.
492.
Dalt. c. 25.
1 Burn. 312.
Dalt. c. 124.

It hath been holden, that a *certiorari* for the removal of a recognizance for the good behaviour, or for any appearance at the sessions, will not supersede the obligation of it; because it would be highly inconvenient, that the party against whom there may be very just matter of complaint, should be let loose upon the bare bringing the writ.

Mr. *Dalton* says, if a man be bound to the good behaviour (before a justice of peace) and to appear at the next assizes or sessions, yet the party bound may, by *certiorari*, remove the recognizance into the *Chancery* or *King's Bench* before the day, and then he shall not need to appear at the assizes or sessions; for they shall have no record, whereupon he may be called there. And this doctrine, clear as it is, is yet further explained by Serjeant *Hawkins*.

2 Haw. 294.

After the recognizance and indictment are removed, the inferior court cannot proceed on either; and if it do, this is a contempt for which

which the superior court will grant an attachment.

A recognizance taken by a justice of the peace, ought to be certified by such justice only till it be made a record of the sessions; after which it shall be certified in the same manner as the other records of the sessions.

4 New Abr.
357.
Cro. Ja. 669.

C H A P. VI.

Of the WRIT of H A B E A S C O R P U S, and
of B A I L thereon.

•• Hitherto the offender has been supposed to be justly committed, or bailed, and fairly brought to his trial; but the legislature of this free country, ever keeping in view a sacred regard to liberty, always allowed of remedies for the subject, when by any undue or unforeseen circumstance, he was unjustly deprived of his personal freedom; for this purpose, in the early days of our government, the writs of *mainprize*, *de odio & atia*, and *de homine replegiando*, were severally allowed, directed to the sheriff to enquire the cause of the confinement; but for want of due restrictions as to the time of executing these writs and the returns, corrupt de-

De Lolme
Const. c. 11.

4 Bl. Com.
430.
17 Car. I. c.
10.

lays and oppressions of office crept in, and gave rise to the petition of right which corrected this grievance, but was in part evaded by the fallacious excuses of the judges; who, in the beginning of the reign of *Charles* the first, devoted to the court, and in office during the royal caprice, declared they could not bail or discharge a prisoner committed by the king or privy council.

These obstacles became grievous to the public welfare; and, aided by the inquisitorial system of the Star Chamber, combined to ruin the ancient establishment of this free country, and portended the most fatal consequences of the state; to this end, they were protracted throughout the reign of *Charles* I. and adopted by his misguided son and successor, and the minions of the crown strove to favour the despotic hopes of their prince; but imprudently extending their projects beyond the limits of a fair hypocrisy, they openly exposed to view the latent design that seemed to pervade the whole court. The people of this country, ever jealous of their freedom, readily took alarm at so flagrant an attack upon their rights, and shortly after the restoration of their unhappy monarch, united to confirm their

their pristine liberty and future safety, by an act of the whole parliament, which stamp'd the character of the people, and set forth their name to other nations, as a just example of noble and upright exertion against the lawless attacks of tyranny and oppression.

But even then, as if it had been determined wholly to exclude the face of liberty from this country, delays were planned, and an *alias* and a *pluries hab. corpus* were allowed and sued out before the first intention and remedy could be obtained: but the *British* parliament were not so easily to be deceived, and having once stepped forwards in the great work of their political redemption, pursued their endeavours by a correction of so base an invasion upon their former statute, and passed a new act which will ever be revered in the rolls of fame.

Such is the *habeas corpus* act: one of the ^{31 Car. 2.} great bulwarks or corner-stones of the whole ^{c. 2.} fabric of the *English* constitution—the relief of the subject, and the just medium between accusation and guilt; it comprises the suppression of the court of Star Chamber; provides an immediate return to the writ it ordains, and allows only *two days* at the utmost for the judge to determine whether to grant or refuse bail.

Vaugh. 136. The writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it: and therefore it is, that the writ commands, the day and cause of the taking and detaining the prisoner, to be certified upon the return; which if not done, the court cannot possibly judge whether the cause of the commitment and detainer be according to law, or against it; and hence it follows, that, either the prisoner must be discharged, because the cause returned of his imprisonment is too general, whereas had it been more particularly returned, he ought *perhaps* to have been remanded; or else he must be remanded, when he ought to have been discharged; both which are inconveniences not agreeing with the *dignity of the law*.

It will be the business of this chapter to recite the act itself, and to shew principally in what cases bail is usually granted on the writ of *habeas corpus*.

SECT. I. *To recite the act: And this shall be done regularly so far as it relates to BAIL.*

31 CAR. 2. CAP. 2. *An act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas.*

After

After reciting the delays already mentioned, It is, for the prevention thereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters,

Enacted, that such writs of *ha. cor.* shall be served on the officer, or left with his deputy, at the gaol where the person is in custody, and shall within *three days* after such service (unless the commitment be for treason or felony plainly and specially expressed in the warrant of commitment) on payment or tender of the charges of bringing said prisoner, to be ascertained by the judge, or the court, and indorsed on the writ, not exceeding *12 d. per mile*, and on security given by his own bond to pay the charges of bringing him back if remanded, and that he will not make his escape by the way. Return shall be made thereto; that he shall then be brought before such persons as the writ commands; and the causes of his detainer be certified, unless the distance be more than 20 miles, in that case and not above 100 miles, then within *ten days*; if above 100 miles, *twenty days*.

§.3. Writ to be marked *per stat. 31 Car. 2.* and signed by the person who awards same. And on refusal to give to the prisoner a copy of his commitment, if committed other than
for

for treason or felony, plainly expressed in the warrant, in vacation time; such prisoner, other than convict or in execution by legal process, may complain to the Lord *Chancellor*, or any of the judges or barons, and they shall grant him a *hab. cor.* returnable *immediate* with the true causes of his commitment and detainer, and thereupon within *two days* after the party be brought before them, shall discharge him from imprisonment, taking his recognizance with one or more sureties in any sum in their discretion, having regard to the quality of the offender and nature of his offence, for his appearance in *King's Bench* the Term following, or at the next assizes, sessions, or general gaol delivery for such county or place where the commitment was, or where the offence was committed, or in such other court where the offence is properly cognizable, as the case shall require, and then shall certify said writ and return thereof, and recognizance into said court,—*unless the person be committed on some offence that is not bailable.*

§. 4. Persons neglecting, for two terms after commitment, to pray for *ba. cor.* shall not have any writ in vacation time.

§. 5. Officer refusing to comply with said writ, or shall not within *six hours* after demand made by the prisoner or other on his behalf,

behalf, to deliver him a copy of such commitment, shall forfeit to the prisoner 100*l.* and for the second offence 200*l.* and be incapable of holding his office; to be recovered by action of debt, &c.

§. 6. No person, enlarged by this writ, shall be again imprisoned for the same offence, other than by the legal order and process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause; penalty for same knowingly, and assisting therein, 500*l.*

§. 7. Persons committed for high treason or felony plainly expressed &c. on prayer in open court, the first week of the term, or first day of sessions of oyer and terminer, or general gaol delivery after commitment; the justices thereof, or of *K. B.* are required on motion in court the last day of term or sessions, to set at liberty the prisoner, on bail; unless it appear, on oath, that the witnesses for the crown could not be produced that term or session; and if on prayer at like time to be brought to trial, shall not in the second term or session be so brought to trial, he shall be discharged from his commitment. 1 Vent. 346.

§. 8. Not to extend to persons in debt, or process in civil causes; and, after discharged on his criminal offence, may be detained in any civil suit.

P. II. HABEAS CORPUS ACT.

§. 9. Proviso, for this writ to remove prisoners from prison to prison; (in which bail is not concerned.)

§. 10. Penalty for denying *ba. cor.* on view of the warrant of commitment, where it is hereby ordained to be granted, 500*l.*

§. 11. Writ to run into counties palatine and privileged places, *Cinque-ports, Wales, Berwick, Jersey, and Guernsey.*

§. 12. No person, subject of this realm, to be sent prisoner beyond seas, either within or without the *British* dominions: such imprisonment judged illegal. Penalty by action of false imprisonment against persons committing, detaining and assisting, treble costs, damages not less than 500*l.* and no delays. Persons framing such commitment, &c. incur *premunire*, and disability of office.

§. 13, 14, 15, 16. General exceptions, &c. not respecting bail.

§. 17. No person shall be sued for any offence in this act, unless within *two years* after same committed, in case the party grieved shall not then be in prison; and if so, then in *two years* after the decease of the person imprisoned, or his delivery out of prison, which shall first happen.

§. 18. After proclamation of assizes, no person to be removed but before the judge in open court.

§. 19. And after affizes ended, any person or persons detained may have *ba. cor.*

§. 20. In suits for offence against this act, the defendants to plead general issue, &c.

§. 21. And because many times persons charged with petty treason or felony, or as accessories thereunto, are committed upon suspicion only, whereupon they areailable or not, according as the circumstances making out that suspicion are more or less weighty, which are best known to the justices of peace who committed the persons, and have the examinations before them, or to other justices of peace in the county, it is enacted, That where any person shall appear to be committed by any judge or justices of peace, and charged as accessory before the fact; to any petty treason or felony, or on suspicion thereof, or with suspicion of petty treason, or felony, plainly and specially expressed in the warrant of commitment, such person *shall not* be removed or bailed by virtue of this act, or in any other manner than they might have done before the making this act.

SECT. II. *Cases where BAIL is grantable on this statute, or otherwise.*

Burn remarks, on this statute, that if an offender, as formerly, were carried to gaol, with- 1 Burn, 151.

without being first carried to a justice of peace, to be by him committed; he would have a right to be bailed on this act, whatever the offence. And the warrant shall specify for what cause, particularly he is committed; not for treason or felony generally, but what sort of treason or felony, and what their particular offence was, that the court may judge whether the offence be bailable or not.

Comb. 6.
12 Mod. 66.
1 Salk. 103.
4 Inst. 71.
Mod. Ca. 97.
Stil. 418.
Lut. 12.

There are several cases which shew that no time shall be lost in proceeding against a prisoner, where he is committed, and this time seems limited to one term, or one sessions; in which case of neglect of the prosecutor, the prisoner shall have his *ba. cor.* and be bailed.

1 New Abr.
381.
Skin. 596.
Salk. 347.
Ray. 65.
5 Mod. 78.
1 New Abr.
381.
and the au-
thorities
there cited.

By the above act a commitment must not, as heretofore, be general; and there is a case of two persons committed for aiding and abetting Sir *James Montgomery* to make his escape, who was in custody for high treason; on a *ba. cor.* they were admitted to bail, because it did not appear what species of treason Sir *James* was guilty of.

Every *mittimus* should have a lawful conclusion, *viz.* that the party shall be kept till "delivered by law," or "by due course of law," or "till further order," or "for want of bail," or otherwise; without such conclusion

clusion the *mittimus* is irregular, and the party may be bailed.

And in order that the prisoner should be entitled to the benefit of the *ba. cor.* act, it is enacted, that the prisoner should enter his prayer to be tried the *first* week of the term, or day of the sessions after commitment: but in this point Lord *Aylesbury's* life was proved critical, and he was (though he had omitted this) admitted to bail.

Salk. 103.
Show. 191.
2 Jo. 222.
Stil. 418.
Lut. 12.

If the warrant of commitment do not specify the crime, *ba. cor.* lies for the prisoner, and he will be discharged by bail thereon; for, without such specification, the gaoler cannot detain him.

1 Bl. Com.
137.

If *ba. cor.* be brought for one committed for felony, the court will admit him to bail, but not with less than *four sureties*; for the crime being capital, extraordinary bail is required.

1 Lil. Abr.
175.

Ha. cor. was brought for a member of the house of commons, committed for a breach of privilege, in order to be discharged on bail. The court would not interpose, and said, they had an inferior jurisdiction, and could not enter upon it. Surely this must have been during the session of parliament.

1 Will. 209.

The court of *King's Bench* cannot pretend to the only discharging of prisoners upon *ba-beas*

Vaugh. 157.

beas corpus, unless in case of privilege; for the *Chancery* may do it without question: so also may the *Common Pleas*, or *Exchequer*, if upon return of the *ba. cor.* it appears that the imprisonment is against law.

5 Mod. 198.

Vent. 330.
346.

After the writ be returned and filed, the court of *King's Bench*, may remand the prisoner to be brought up from time to time till they are determined whether to bail or not.

Vaug. 157.
Mir. c. 2.
Coke, f. 55.

2 Jones 13,
14.

An *ba. cor.* may be had out of the *King's Bench* or *Chancery*, though there be no privilege, &c. or in the court of *Common Pleas* or *Exchequer*, for any officer or privileged person there; upon which writ the gaoler must return by whom he was committed, and the cause of his imprisonment; and if it appeareth that his imprisonment be just and lawful, he shall be remanded to the former gaoler; but if it shall appear to the court that he was imprisoned against the law of the land, they ought by force of the statute to deliver him; if it be doubtful, and under consideration, he may be bailed. The *King's Bench* may bail if they please, in all cases; but the *Common Bench* must remand, if the cause of the imprisonment returned be just.

Vaug. 157.

But the prisoner is to be discharged or remanded barely upon the return, and nothing

thing else, whether in the *King's Bench* or *Common Pleas*.

It is manifest, where the *King's Bench* hath upon *ha. cor.* discharged a prisoner committed by the *Chancery*, the person hath been again committed for the same cause by the *Chancery*, and redelivered by the *King's Bench*, but no quashing of the *Chancery* order for commitment ever heard of; this is not practicable, nor could it avail the prisoners any thing; and besides, in such cases of recommitment, the party hath other and proper remedy, besides a new *ha. cor.* Vaugh. 158.

Ha. cor. was brought, and defendant admitted to bail for forging indorsements on exchequer bills, because the crime was only a great misdemeanor; for though the forging the bills, is felony, yet forging the indorsement is not. It is felony by 8 & 9 *W. 3. c. 20.* Salk. 104.

Ha. cor. was brought to admit defendant to bail for a libel; and the court suffered him to enter his own recognizance, but desired time to consider of bail; nothing is mentioned of their opinion having been ever given, and in the margin, a case is cited, where they never gave any. 1 Will. 29.

If the prisoner be convicted, and the conviction appears on the return of the *ha. cor.* to be only defective in point of form; it is at the election of the court to bail or discharge, Salk. 348.
5 Mod. 19,
20.

Q

charge,

charge him, or oblige him to bring his writ of error.

Salk. 61.

103.

4 Inst. 178.

3 Bulst. 114.

1 Rol. Rep.

268.

2 Stra. 848.

Bail is never allowed for one convicted of manslaughter, till clergy had; but Mr. *Lisle's* case is expressly contradictory to this rule.

Kimberley was brought up by *habeas corpus*, being committed to *Woodstreet Compter*, for feloniously marrying *Bridget Reading*, contrary to an *Irish* act of parliament, (6 Ann.) in order to be transmitted to *Ireland* to be tried; the offence being committed there.

Strange moved that he might be discharged or *bailed*, insisting that justices of peace in *England* are confined to act only as to such offences as are against the laws of *England*, and committed in *England*; and the proviso in the *ba. cor.* act gives no power as to offences in *Ireland*, but leaves it on the former practice. *Sed per cur.* it has been done in Col. *Lundy's* case, and the court have refused to bail a man committed for a murder in *Portugal*. If application is not made to have him sent over in a reasonable time, you may apply again. Thereupon defendant was remanded, and upon application to the secretary of state, it was referred to Mr. Attorney General to consider of the manner of sending him over: and upon an attendance by counsel, Mr. Attorney reported,

2 Ven. 314.

3 Keb. 785.

ported, that he might be taken from the *Compter* by a messenger, who should have a warrant to carry him to *Ireland*, whither he was carried, tried, condemned, and executed.

A person brought out of *Wales* by *ba. cor.* Sty. 418. moved to be bailed, because they had no gaol-delivery there; and he was bailed to the next assizes.

For cases on the suspension of the *ba. cor.* act, see 8 *Mod.* 98, and Sir *W. Wyndham's* case. 3 *Vin.* 515. 534. 17 *Geo.* 3. c. 9.

Aston keeper of the *Marshalsea* prison, having before been tried for supposed murders of four persons, by putting them in a place called the strong room, on all which he was acquitted to the general satisfaction; but presently after he was at liberty, a single justice of the peace, upon informations of a fifth person having been put into the same room, and dying within a year after, thought fit to commit the defendant again for *murder*: And upon *ba. cor.* moved to be admitted to *bail*, on producing copies of the informations and affidavits of the former trials, and of the identical nature of the offences: but the court refused to look into the informations, though they were pressed with Lord *Mobun's* case, where they looked into the depositions taken by the coroner, upon a motion

2 *Stra.* 831.

3 *Salk.* 104.

to *bail*; and in the present case they remanded defendant, who lay in prison till next assizes, when the grand jury did him the justice to return the bill *ignoramus*, and he was discharged.

The judgment in the case of Lord *Mobun*, is only reported by *Salkeld* 104. viz. If a man be found guilty of murder by the coroner's *inquest*, we sometimes *bail* him, because the coroner proceeds upon depositions, taken in writing which we *may* look into; otherwise, if a man be found guilty of murder by a *grand jury*; because the court cannot take notice of their evidence, which they by oath are bound to conceal. *Et per cur.* There is no difference between peers and commoners as to *bail*.

1 Bulst. 85.

3 Bulst. 113.

1 Kol. Rep.

268.

1 Sid. 316.

2 Stra. 911.

As in *Dalton's* case, who had the misfortune to kill his school-fellow at *Eaton*. He was committed by the coroner for manslaughter. On motion on *ba. cor.* for bail the *Ch. J.* said, his being committed for manslaughter was no reason; for if the depositions amounted to murder, he would not bail; *e contra*, if they amounted only to manslaughter, he would bail, though the coroner's *inquest* had found it murder; and said, the distinction was, between the coroner's *inquest* where the court could look into the depositions; and

and in indictment, where the evidence is secret.

So likewise, *J. S.* being committed upon an indictment for murder, moved to be *bailed*, and this within three weeks of the sessions. *Rokesby* and *Turton* were for bailing him; because the evidence upon the affidavits read did not seem to them sufficient to prove him guilty. *Holt* Ch. J. and *Gould contra*: The evidence does affect him, and that is enough; the allowing the favour of bail may discourage the prosecution; therefore it is not fit the court should declare their opinion of the evidence before-hand; for it must prejudice the prisoner on the one side, or the prosecutor on the other. Bail was not granted.

The maxim established by *Davison's* case, is, that a person taken on an *excom. capiendo* is bailable while the return of the *ba. cor.* is under the consideration of the court. Upon a *ba. cor.* to bring up the body of defendant a *Quaker*, the cause returned was a writ of *excom. capiendo*; which recited a *significavit* of an excommunication for teaching school without a licence; and the court doubting whether this was an offence, desired to hear counsel thereon; and then *Mr. Northey* moved, that he might be bailed in the mean time; and cited several autho-

Salk. 104,
106.
2 Jon. 222.
Stil, 116.
1 Bulst. 85.

Salk. 105,
134, 294.
106.
1 Bulst. 122.
Far. 59, 61.
1 Cro. 507,
552, 557,
558.
Latch. 174.
Cro. Ja. 29,
67.
1 Roll Rep.
132, 384.
1 Sid. 286.
2 Roll Abr.
113.
Vaug. 157.

rities that a man might be bailed while the return was under consideration; and also *Price's* case, *Mich. 29 Car. 2, B. R.* who was taken upon an *excom. capiend.* and brought up by *ba. cor.* and bailed, while the return was under consideration; and in that case the court being against *Price* upon the return, his counsel insisted that he could not be committed again, and thought they had got an advantage that way; but notwithstanding, he was recommitted. He cited also *Clerke's* case, who was committed by the *Vintner's* company, and bailed by *Holt Ch. J.* at his chamber. Upon these authorities, the defendant was bailed, and the entry was *traditur in ballium et interim curia advisare vult*; and the condition of the recognizance was to appear the first day of the term, and from day to day; and if the court should adjudge the return good, to render his body to prison. The chief justice said, they bailed men in execution, upon an *audita querela*; and by the petition of right must bail or remand men in convenient time. The same rule was made in that term, (*Trin. 12 W. 3. B. R.*) in *Reynold's* case, (who was committed by the court of aldermen for assisting to marry a city orphan) while the court considered the return.

Salk. 106,
105, 294.
Fam. 56, 117,
134.

Similar to *Davison's* case cited above, is, that of Doctor *Watson*, Bishop of Saint *Davids*; but bail was denied here, because of

a false plea : defendant was taken on an *ex-
commun. capiendo*, and brought into *B. R.*
by *habeas corpus*, and pleaded to the writ,
that he was a Lord of parliament, and moved
to be bailed, while the return was under
consideration ; and *Powell* said, though it
had been done, it was in their discretion,
and was contrary to the statute of *Westmin-
ster* ; and he did not think it discretion upon
such a plea, which every body knew to be
false, he being deprived by commissioners
of delegates, of which *Powell* was one on
the appeal. *Holt* Ch. J. agreed ; and that
though they could not take judicial notice
of the frailty of this plea, yet it should lean
their discretion ; and he was not bailed :

Mod. Ca.
16.
Vaug. 157.
Lut. 174.
1 Cro. 552.
557.

A person came up on a *ba. cor.* charged
with a commitment for a robbery on the
highway. And the prosecutor attending, in-
sisted he was the man ; and though eight af-
fidavits of credible persons, proving him to
be at another place at the time the robbery
was sworn to, were read ; yet the court re-
fused to admit him to bail, but ordered him
to remain till the assizes.

2 Stra. 1138.

A person indicted on *suspicion of robbery*,
was outlawed, and taken on the outlawry,
and brought writ of error ; and being
brought up to the *King's Bench* by *ba. cor.*,
prayed bail, and took two exceptions to the

Sty. 418.

indictment, viz. 1. That he was in prison, and knew nothing of the outlawry. 2. That the charge is too general, and nobody prosecutes : but by *Roll Ch. J.* he *cannot* be bailed.

11 Mod. 261. A person charged with *picking pockets*, on motion for a *ba. cor.* and offering unexceptionable bail ; though the court had a discretionary power, yet, there being affidavits of defendant's being charged with the fact, they consulted and refused bail : — *Holt Ch. J.*

Ray 381. A person accused of high treason, and not within the *ba. cor.* act, is not *de jure* to be bailed by the court of *King's Bench*.

11 Mod. 45. A man was brought up to *B. R.* by *ba. cor.* upon a commitment by a justice of peace, who had cognizance of the cause ; it was said, he was not bailable till the order is quashed, because till then he is in execution.

1 Raym. 61. The prisoner must enter his prayer according to the *ba. cor.* act in the same county where he ought to be tried, else bail will be denied him thereon ; as in the case of *Leason* and another, where this was declared to be the intent of the act, and in that case it should have been at the assizes in *Surrey*, for the *K. B.* cannot originally hold plea of felony out of *Middlesex* ; and therefore *K. B.* will remand the prisoners.

De-

Defendant was out on bail in an action in *B. R.* and was taken on an *extent* at the Queen's suit; the bail brought him up on a *ba. cor.* and prayed he might be committed to the *Marshall* in their discharge; and notwithstanding great opposition was made by the Attorney General, he was turned over, because the action here was precedent to the extent.

A person being committed as a *notorious sewer and smuggler*, moved on *ba. cor.* to be discharged, because he had been in gaol *two terms* since the indictment was found, and not yet brought to his trial, and because of the vagueness and informality of the warrant; The court held the first objection good; but as to the other, they held, that a justice of peace must take care that he has such an information of the fact as may be sufficient to support his warrant of commitment; but he could not set it forth in the warrant itself, because so much certainty is not required in warrants, as in writs and pleadings which are always on record; they were of opinion to *bail him*, but he having no bail, was remanded.

C H A P. VII.

OF SURETIES.

Having now traversed through the necessary and usual concerns of bail in criminal cases, the closing part of this work seems to be well adapted to the consideration of the nature of sureties, in like manner as the close of the first part was made to explain the nature of pledges, which seems to bear some affinity to that of sureties; inasmuch as that neither of them are altogether like bail, although they stand very nearly in the same predicament.

SURETIES may be confined to two heads:

SECT. I. *For the preservation of the peace.*

SECT. II. *For the good behaviour.*

It will perhaps be obvious to the reader, that the sureties given before the magistrate, when the offender is discharged from the custody of the officer, or those which are then given by the accuser to prosecute at the next sessions of the peace, might have been arranged under this chapter; but as it was found necessary heretofore to mention this

this matter under the head, of Cases bailable, so it is deemed unnecessary to recapitulate the same here. The above order has been therefore laid down for this subject.

SECT. I. *Of Sureties for the peace.*

This must for clearness be divided thus:

1. *What is Surety of the Peace.*
2. *When grantable, and when not.*
3. *How the recognizance is forfeited.*
4. *How the same is discharged or superseised.*

1. *What is this Surety.*

Surety of the peace, says Dr. Burn, is the acknowledging a recognizance, or bond to the King, taken by a competent judge of record; for the keeping the peace; and this surety every justice of the peace, may take, and command, by a twofold authority:—1. as a minister commanded thereto by a higher authority; (as when a writ of *supplicavit* directed out of chancery or B. R. is delivered to him) 2. As a judge, and by virtue of his office, derived from his commission.

And this recognizance may be regulated at the discretion of the justice, as to the penalty, number, and sufficiency of the securities, and time of continuance; but if it specifies

4 Burn, 227.
Dalt. c. 116.

1 Haw. 129.
4 Burn, 234.
4 New Abr.
692.
Lamb. 100.

ifies none of these, and is general, it is good; and if it fixes no time, it shall be held for life: but it is the usual and safest way to bind the party to the next sessions.

Stra. 1202.

When articles of the peace are presented to the court, which is done on oath, the court will give credit to the oath of the party, and cannot inquire into the truth of the articles, but may review them, and hear any objections arising on the face of them as to the propriety of granting surety thereon.

Dalt. c. 176.

The condition of this recognizance is, that if (the offender) shall personally appear before the justices of our sovereign Lord the King, at the next general sessions of the peace to be holden in and for the said County of ——— to answer to such matters as shall be objected against him by (the party complaining) to do and receive that which, by the court, shall be then and there enjoined him; and that if he, in the mean time, do keep the peace of our sovereign Lord the King, towards the King's majesty and his liege people, and especially towards the said (party complaining) then to be void; &c.

2. When

2. *When this Surety is grantable, and when not.*

Lambard and *Dalton* both think it seems clear, that if a man is in fear of some future injury, as that another will hurt his goods, or his servants or cattle, surety for the peace shall not be granted him; for this is the servant's fear, and not his master's; and as to the goods, the recognizance is to the King and people, and for their benefit, and not for goods. Thus then the granting surety is reduced only to personal fear.

3 Burn, 18.
Lamb. 82.
Dalt. c. 116.

4 Burn, 229.

But it is further said, that if one threatens to hurt a man's wife or child, he may crave the peace, by virtue of these words in the commission of the peace: "And to cause to come before you all those who to any one or more of our people *concerning their bodies* or the firing their houses, *have used threats*, to find sufficient surety for the peace, or for their good behaviour towards us and our people." "And if they shall refuse to find such surety, then them in our prisons until they shall find same to cause to be safely kept."

3 Burn, 7, 4.
228.

Have used threats] It should seem from the many causes which, from time to time, have been adjudged sufficient to bind to the good behaviour, that this expression is not

3 Burn, 12.

to be understood of *words* only, but of threatening *actions* likewise, or any thing whereby a man has just cause to apprehend the burning of his house, or some bodily hurt to be done to him; and the justice is bound to grant security on oath of such fear.

4 Burn, 228.

5 Burn, 18.

For the peace, or their good behaviour. Lord Hale speaking of the statute 34 Ed. 3. c. 1. (on which Mr. Crompton says, that this power of the justices to bind to the good behaviour is grounded) says, that this binding, though expressed generally, and without any time limited, yet is not intended to be perpetual, but in the nature of bail, *viz.* to appear at such a day at their sessions, and in the mean time to be of good behaviour; but see *ante* 236, where it is said, if no time limited, it shall be held for life; but the usual form obviates this difficulty.

6 H. H. 137.

Noy. 70.

When an offender is brought before a justice of peace, the party ought to tender sureties, and it doth not behove the justice to demand it.

4 Burn, 230.

1 Haw. 126.

Crompt. 118.

Stra. 1207.

1202.

All persons whatsoever, under the King's protection, being of *sanæ memory*, whether natural and good subjects, or aliens, or excommunicate, or attainted of treason, have right to surety of the peace; and it is certain a wife may demand it against her hus-

band, threatening to beat her outrageously; and that a husband may have it against his wife: and if the wife cannot find sureties, she shall be committed, and so the man be rid of a shrew.

An infant under the age of fourteen may have this security; but infants and feme covert ought to find security, amongst their friends, and not be bound themselves.

Dalt. c. 117.

1 Haw. 127.

A woman exhibited articles of the peace, styling herself the wife of defendant; setting out acts of cruelty, and the pendency of a suit in the ecclesiastical court for restitution of conjugal rights; defendant coming to put in security, insisted the recognizance should not be taken so as to carry any admission of their marriage, and the court ordered it should stand thus: "To keep the peace, towards our sovereign Lord the King, and all his liege people, and particularly towards *Hannab Penn*, who hath exhibited articles of the peace against him the said *J. Bambridge*, by the name of *Hannab Bambridge*, wife of him the said *James*, and that he shall not depart the court without leave, &c."

Stra. 1231.

If a man finds surety for the peace before the justices of the peace in the county, at the suggestion of *A*, and after this, *A*. comes in to *B. R.* and makes oath, That he is in doubt of being ill treated by him, and prays surety of the peace against him, he is to have it; and

2 Blackerby,

342.

Moor 43.

pl. 131.

and upon that a *superfedeas* to the justices of peace to discharge the bond which is before them. Held by all the judges.

2 Blackerby
45.

Threatening to take and imprison a man, is no cause to arrest and imprison him, till he find surety for the peace.

1 Haw. 127.

One threatened to be imprisoned, or to be beaten, may demand this security.

M^{ss}. Cafes.

A *Portuguese* vessel arrived in the river of *Thames*; the sailors on board were under a written covenant with the captain, to navigate the vessel from the port of *Lisbon* to that of *London*, to go on shore in *London* only by the captain's permission, and when the vessel was reloaded there, to navigate her back to *Lisbon*. Two of the sailors having received permission to go on shore, resolved not to return on board, and in the darkness of the night set upon the captain in his way to the ship, and used him with great cruelty; he laid his complaint before the magistrates in *London*, and they were brought up the next day, by virtue of a warrant, for the assault, and having confessed the assault, and it not being possible for the captain to be in *England* at the next sessions of peace, he prayed not to be bound over to prosecute, and to have his men; which was granted, on their giving securities to keep the peace, and to sail according to their covenant, and they were remanded on board immediately.

On

On exhibiting articles of the peace, it was objected, that the fact was done before the act of grace, and pardoned thereby; and the crime being gone, by this, it must be considered as never done; and the court never demands security for the peace barely on a man's swearing he goes in danger of his life, without laying some fact before the court, that it may appear to be such a *metus qui cadere possit in constantum virum*: But by the court——Suppose it was threats only, would not they be a ground for articles, though they are punishable? Though the fact is pardoned, yet it may be instanced for an inducement to us to believe defendant a dangerous person. The defendant entered into the recognizance. Stra. 473.

Security of the peace must be prayed and taken, where the offence was committed which gave rise to it, for else it might be very vexatious; the security must be given where the articles are presented; and in this case, a defendant might be obliged to travel many miles; or if there be any particular inconvenience arising therefrom, a *mandamus* may issue to a justice of the peace in the county, empowering him to take security there; or the same may be done by indorsing the attachment of the peace with such a power, and specifying the sums in which the parties should be bound. 2 Burr. 780. Ibid. 1040.

4 Burn, 233.
Dalt. c. 116,
c. 119.

In like manner, as in cases of bail, if the justice has been deceived in the sufficiency of the sureties, he or any other justice may afterwards compel the party to put in other sufficient sureties, and may take a new recognizance for the same.

Dalt. c. 116.

If a man will require sureties of the peace, because he is at variance, or in suit with his neighbour, it shall not be granted.

Dalt. c. 117.

A person of nonsane memory cannot have it, nor can it be granted against him; but if there shall be cause, the justice ought to provide for his safety.

1 Haw. 127.

The nobility are exempted from this surety, and the safest way of proceeding against them, is by complaint to the *Chancery* or *King's Bench*.

3. *When this recognizance is forfeited; and when not so.*

Dalt. c. 121.
4 Burn, 235.

The act that shall extend to a forfeiture of the recognizance must be done or intended to the *person*, or in terror of the people:— therefore to enter lands where he ought to bring his action; or to dispossess another of his lands; or to enter lands or tenements with force, without offer of violence to any one, and without public terror; or to commit a trespass in another man's corn or grass; or to take away another's goods wrongfully, so
it

it be not from his person, or to steal another man's horse, or other goods feloniously, being not from his person: All these and the like are breaches of the peace, but will be no breach of the recognizance; nor breach of the peace within the meaning of the commission.

Mere words of anger or passion, as liar, knave, rascal, drunkard, are no forfeiture; for they do not challenge a man to break the peace, though they tend to it. 1 Haw. 130

If a man hath broken his bond, when convicted thereof by due course of law, the justice ought, of discretion, to bind him anew. Lamb. 78.
Crom. 125.

If the recognizor makes default in appearing at the sessions, the justices may, at their discretion, order the recognizance to be continued to the next sessions (for which further securities have been taken) or may take a reasonable excuse for nonappearance: otherwise the default shall be recorded, and the recognizance and record be certified into *Chancery, King's Bench, or Exchequer*; and in cases of felony, by 1 and 2 P. and M. c. 13. to be certified to the justices of general gaol-delivery. This matter seems to be understood liberally, and there are many cases of actual assaults that do not forfeit a recognizance; 4 New Abr. 693.
Bro. Peace. pl. 17.
Dalt. c. 120.
Lamb. 109.
3 H. 7. c. 1.
2 Haw. 130.

such as lawful chastisement, reasonable restraint, and the like.

Dalt. c. 120. If the *husband* be bound that he and his *wife* shall appear at such sessions, and that they shall keep the peace in the mean time, &c. and at the day the husband doth appear, but not his wife. Here Mr. *Crompton* saith, the recognizance is not forfeit; for if there shall be cause to continue this surety of the peace against the *husband* and *wife*, he shall be bound and not the *wife*; and therefore the *wife's* appearance is not greatly material, but *query* this doctrine; and see *Fitz. Forfeiture* 17. 8 E. 2.

Lamb. 115, 127. But the recognizance is forfeited by doing violence to any person, whether this be done by the party bound, or by some other thro' his procurement; as, by manslaughter, rape, robbery, unlawful imprisonment, and the like; but it is not forfeited by any assault, which could have been justified in an action, or upon an indictment for the assault.

1 New Abr.
154.

1 Blackerby 342.
2 H. 7.
2 Roll. Rep. 199. But it is added, that to a forfeiture of this recognizance, there must be an actual breach of the peace by an affray, battery, or the like.

Br. Tit. Peace No. 20.
NewCa.f. 77.
a 1 pl. 351. Procuring another to break the peace, is a forfeiture of this recognizance.

1 Haw. 130. This recognizance is forfeited by treason against the king's person, by unlawful assembly

sembly

sembly in terror of the people; and even by words tending to a breach of the peace, as by challenging one to fight, or in his presence — threatening to beat him, otherwise if the party be absent—and yet if the party so bound shall threaten to kill or beat a person absent, and after shall lie in wait for him, it is a forfeiture.

2 Blackerby
341.

Dalt. c. 121.

The *principal* entered into a recognizance with *bail* to keep the peace for *one year*, and afterwards to appear in court, on the *first day of Term*, which latter part he neglected to perform; and it was moved that this recognizance might be *estreated*, so that the bail might be prosecuted. The Ch. J. held, That where a man be admitted to bail, he is by intendment of law in their custody; but when he is taken from them by the process of the court, then they are discharged. All the other judges differed, *viz.* that they are not discharged till the *committitur* of the principal is entered; for though he was committed on the *conviction* on the *information*, he was as much in the power of his bail, as if he had been at large, or still in their custody; for on a motion in this court, they might have brought him up at any time, and *rendred* him back again in discharge of themselves.

Trin. 10 Geo.
8 Mod. 195.

Afterwards it was moved that the *committitur* might be entered, so as the bail might

R 3

take

take benefit thereof, and that the proceedings on the *sci. fa.* might be stayed in the mean time. But the court refused to stay proceedings, but ordered that a *committitur* should be entered on the right recognizance; for there being *two*, viz. one for the peace and the appearance of principal; which was forfeited by his not appearing: and the other, for his appearance to answer the information, on which he was afterwards convicted: the *committitur* must be entered on the last recognizance.

2 Stra. 1220. The condition of a recognizance was to appear the last day of Michaelmas term; on which day articles of peace were exhibited, and one of the defendants forbore to move to have his appearance recorded, (though he was present) and went to get bail. On this, prosecutor took out a *sci. fa.* tested 28th November; and partly for the sharpness of the proceeding, and because the *sci. fa.* must be tested in term time, and he had to the last moment of it to appear in—the court set aside the proceedings.

1 Haw. 130.
Dalt. old Ed.
c. 70.

4 Burn, 237.

When the recognizance is forfeited, the recognizance and the record must be removed into some of the courts at Westminster, and be there proceeded on by *sci. fa.*; and so it ought to be, if presented by the jury or grand inquest.

4. *Of discharging or superseding this recognizance.*

He who is bound to the peace, and to appear at a certain day, must appear and record his appearance altho' the other party do not come to desire it may be continued; otherwise the recognizance cannot be discharged. But on proclamation made, if no person appear against him, it may be discharged; but if he be bound generally, and especially to keep *the peace towards a certain person*, and he comes not, the court may, in discretion, bind him over till next sessions. Dalt. c. 120.

But if no time to appear be mentioned, they may discharge it at discretion. 4 New Abr. 695.

It is the practice of the quarter sessions to continue the recognizance from sessions to sessions; *King's Bench* for twelve months: and if no indictment be then found, to discharge it; so in *Chancery*: but contra *Dalton*; 12 Mod. 251. If no time be specified, it is for the party's life, and neither king, justice, or party can release it. Stra. 835. Dalt. c. 119, 120. 2 Will. 202.

The king cannot release a recognizance before it is broken, because the subject hath an interest therein; but after forfeiture, he alone may release it, and pardon the forfeiture. 2 Haw. 129.

Stra. 835.

Mandamus was granted to three justices of peace, in *Brecon*, to take security on articles of the peace exhibited against defendant in *B. R.* and an affidavit was produced of his being seventy years of age, and unable to travel; and cited *Seymour's case. Mich. 6 Ann.* And in *Trin.* following, on affidavit of having kept the peace and being unable to come up, recognizance was discharged,

Lamb. 113.

Bro. P. pl. 17.

1 Haw. 129.

If one of the sureties die, the party shall not be obliged to find a new surety; for the executors and administrators of the deceased are bound by the recognizance,

4 New Abr.

694.

8av. 53.

If the party bound die himself, the sureties, upon shewing this, may be discharged from their recognizance.

1 Lev. 235.

1 Haw. 129.

Dalt. c. 118.

If the party craving the surety die, the recognizance may be discharged; and defendant, if in custody for want of sureties, may be delivered.

Bro. P. 17.

Lamb. 111.

The party praying the security, cannot by a release, discharge the recognizance; for it is to the King, and he alone can discharge it. The court cannot discharge it, before the condition be performed, but a release may induce the court to do it.

11 Mod. 109.

1 Haw. 129.

Bro. P. pl. 15.

1 Haw. 129.

3 Burn, 14.

Blackerby

341.

A recognizance is discharged by the demise of the King: for the words are, "to keep *our* peace," and therefore it is not *his* peace who succeeds; and *Blackerby* only adds,

adds, contrary to the above subsequent authorities, that the death of recognizer or recognizee discharges the recognizance, if not forfeited before.

By this statute no writs of *supersedeas* to discharge a recognizance for the peace, shall be granted out of *Chancery* or *King's Bench*, but upon motion in open court, and on such sufficient securities as shall appear to the court, on oath, to be assessed in the subsidy-book at 5 *l.* lands, and 10 *l.* goods; and unless it shall first appear to the court that the process of the peace or good behaviour, is prosecuted against him desiring such *supersedeas*, *bonâ fide*, by some party grieved in that court, out of which the *supersedeas* is desired to be awarded.

SECT. II. Of Sureties for Good Behaviour.

* * As much of this present section is necessarily involved in the former, it will render the following subject more brief, as the principal matters must be referred to the former in all the similar cases wherein they apply.

1. A man may be compelled to find sureties for good behaviour, and for the peace, at once; and yet the former of these doth include the latter, and he that is bound to the one, is therefore bound to the other.

4 Burn, 238.
Dalt. c. 122.

Words

2 Roll Rep.
199.

Words which amount to a breach of the good behaviour, ought to be such as tend to the breach of the peace; else, it is not a breach of the good behaviour.

4 Burn, 184.
2 Salk. 698.
1 Keb. 931.

In general, it seems that *words* which directly tend to a breach of the peace, as if one man *challenge* another, are cognizable before justices of peace, for which the party may be bound to the good behaviour, and even indicted.

1 Vent. 16.

Words disrespectful of the justices, as that *they do not understand the statutes, &c.* are not indictable, but are good grounds for binding the party to good behaviour.

March 11.
pl. 30.

A woman was bound to the good behaviour for suborning witnesses.

Latch. 5.

An attorney was indicted for a common Barretor, but acquitted; but he was bound to the good behaviour, for threatening the witnesses, and being a person of indifferent character.

Sty. 18.

A justice of peace cannot bind to the good behaviour *upon a general information*, or commit to prison for refusing to find sureties on such information.

Comb. 40.

Although a person be found not guilty of the matter laid in the indictment, he may yet be bound to good behaviour. Likewise,

Such

Such as practise to poison another; and 4 Burn, 247.
for poisoning their food, by mingling ratsbane
with corn given to fowl, whereof they died :

Also, for beating, assaulting, or threaten- 1 Haw. 195.
ing a person in presence of the justices, Crom. 124.
or so that he could not attend the court.

It is a discretionary power vested in the 4 Burn, 251.
justices, yet they must remember that it is
a legal discretion, in which, in favour of li- 5 Co. 100.
berty, great tendernefs is to be used ; which 10 Co. 140.
is, as Lord Coke says, a knowledge to dis-
cern between truth and falsehood, right
and wrong, shadows and substance, equity
and colourable glosses and pretences ; and
not to do according to our wills and private
affections ; and such discretion is to be li-
mited and bounded with the rules of rea-
son, law, and justice !

The form of the condition of this re- Dalt. c. 176.
cognizance is the same, as that already p. 481.
stated for surety of the peace, adding only
after the clause for the offender's appearance ;
“ and that in the mean time he be of good
“ behaviour, and do keep the peace of our
said Sovereign Lord the King towards,” &c.

And Mr. Dalton adds, that the recogniz- Ibid. p. 482.
ance runneth, *de terris et tenementis, bonis et*
catallis, &c. fieri & levare, &c. and yet the
King may be at his election to take exe-
cution of the bodies of the recognizors,
(as

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

2. Once the problem is identified, the next step is to define the objectives and goals of the project. This helps to clarify what needs to be achieved and provides a clear direction for the team.

3. The third step is to develop a plan or strategy to address the problem. This involves breaking down the problem into smaller, manageable tasks and determining the resources needed to complete each task.

4. The fourth step is to implement the plan. This involves putting the strategy into action and monitoring progress regularly to ensure that the project is on track.

5. Finally, the fifth step is to evaluate the results of the project. This involves assessing the outcomes against the objectives and goals to determine the effectiveness of the project and identify areas for improvement.

I am very sorry to hear
that you are having trouble
with your stomach. I hope
you will get better soon.
I am sending you some
medicine which I think will
help. Please take it as
directed. I am sure you
will feel much better in
a few days. Write me again
when you can.

Your friend,
John Doe

It is further stated & pointed out, that the Government will be able to meet any requirements for the purchase of goods for the next 100 years, and it is to be noted, that the Government is not to be bound, but that the Government

...this recognition shall not only be
 kept by the first actual breachers of the peace
 but every recognition of the peace may
 be kept on, not also for some others for
 whom such a recognition cannot be for-
 gotten, as, for going armed with great num-
 bers.

bers, to the terror of the people, or speaking words tending to sedition; and also for all such actual misbehaviours which are intended to be prevented by such a recognizance; but not for barely giving cause of suspicion of what perhaps may never actually happen.

If a man be bound in a recognizance to the King, upon condition to be of good behaviour, he cannot be indicted for breach of good behaviour, by which he forfeits his recognizance, without a *sci. fa.*; for if a *sci. fa.* had been brought, he might have pleaded some matter in the discharge thereof.

Words which do not threaten any hurt to the person are no forfeiture of the recognizance, though they may be rude and impertinent; to forfeit this recognizance an act must be done which imports some intention to do some violence to the person: As to say, *I will meet thee*: but it is no breach to enter a close, though it would be, to take any thing from the person *vi et armis*.

It has been held, that a *certiorari* to remove a recognizance for good behaviour, or for an appearance at the sessions, will supersede its obligation.

But this would be inconvenient; and the contrary opinion seems supported by better authorities.

As

4 New. Abr.
414.

4 Inst. 181.
Roll. Abr.

900.
Cro. Car.

498.
3 Bulst. 220.
Cro. Ja. 412.
Stil. 369.

2 Blackerb.
Ca. 180.
See Moor,
249. pl. 395.
Cro. El. 86.
pl. 7.
2 Roll. Rep.

271.
Palm, 176.

2 Blackerby
182.
2 Roll. Abr.
492.
Dalt. c. 75.

Cro. Ja. 282.
Yelv. 207.
1 Bulst. 155.
156.
Haw. P. C.
pt. 2. p. 294.

Dalt. c. 124.
Lamb. 126.

As to releasing this security, Mr. *Dalton* expresses his doubt, by only reciting, that whether the recognizance may be released by any special person, some do doubt, because it seems more popular than the surety of peace; yet he adds, that others do hold, that it may be released, either by the justice of the peace himself that took it, in discretion, or by the party on whose complaint it was granted, even as that for the peace may. Dr. *Burn* joins his own authority to that of *Hawkins* under the article of surety of the peace; and they do declare, that as the recognizance is taken "to keep the peace towards the King and all his people, but particularly towards *A. B.* the party complaining," a release from such party is ineffectual, although it may be a great inducement to the court to discharge the recognizance.

APPENDIX.

I.

SCIRE FACIAS, *against one of the BAIL in Debt.*

GEORGE, &c. to the Sheriff of —, Lilly's Ent. 387. 657.
 Greeting. Whereas *James A. Gent.* lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *John C. Esq.* otherwise called, &c. and *Thomas Esq.* otherwise called &c. 800*l.* debt, and also 63*s.* for his damages, which he sustained as well by reason of the detention of that debt, as for his costs and charges by him about his suit in that behalf expended, whereof the same *John* and *Thomas* are convicted, as it appears to us on record: And although judgment thereof is given, execution nevertheless for the debt and damages aforesaid remains yet to be made. And whereas *George W. of &c.* otherwise, to wit, in — term, in the — year of our reign, before us at *Westminster*, personally
 came

came and became pledge and bail for the said *John*, that if it should happen that the said *John* should be convicted at the suit of the said *James* in the plea aforesaid, then the same bail granted, that as well the debt aforesaid, as all such damages, costs and charges, as should be adjudged to the said *James* in that behalf, should be made of his lands and chattels, and levied to the use of him the said *James*, if it should happen that the said *John* should not pay the debt and those damages, costs and charges to the said *James*, or should not surrender himself to our prison, to the marshal of the *Marshalsea*, before us on that account, which said debt and the damages, costs and charges, are not paid to the said *James*, nor hath the said *John* surrendered himself to our prison, to the marshal of the *Marshalsea* aforesaid, before us, as by the suggestion of the said *James* we have, in our court before us, understood ; Wherefore the said *James* hath besought us to grant him his proper remedy in this behalf. And we being willing that what is just in this behalf should be done, command you that by good and lawful men of your bailiwick you give notice to the said *George*, that he be before us at *Westminster* on ———, to shew, if he hath or can say any thing for himself, why the said *James* ought not to have his execution against him for the debt

debt and the damages, costs and charges
aforesaid; according to the force, form and
effect of the recognizance aforesaid, if he
shall think fit. And further to do and re-
ceive what our same court before us shall
then and there consider concerning him in
this behalf; and have there the names of
those by whom you shall give him notice,
and this writ. Witnefs, &c.

II.

FIERI FACIAS *in debt against both BAIL;*
in K. B.

George, &c. To the sheriff of ———, *Lilly's Ens,*
greeting. We command you, that of the *589.*
goods and chattels of *R. F.* and *J. W.* the
bail of *A. B.* in your bailiwick, you cause
to be made —*l.* debt, which *E. P.* lately in
our court before us at *Westminster*, recovered
against the said *A. B.* and also —*s.* costs,
which to the same *E. P.* in the same court,
were adjudged for his damages, which he
sustained as well by reason of the detention
of that debt, as for his costs and charges by
him about his suit in that behalf expended,
whereof the same *A. B.* is convicted, as it
appears to us on record. And whereon in
our same court before us at *Westminster*, it is

S

confi-

considered that the said *E. P.* may have execution against the said *R. F.* and *J. W.* for the debt and damages aforesaid, according to the force, form and effect of a certain recognizance by them the said *R. F.* and *J. W.* in our said court before us, for the said *A. B.* at the suit of the said *E. P.* in the suit aforesaid, acknowledged (*a*), as it likewise appears to us on record, and have that money before us at *Westminster* on, &c. to be paid to the said *E. P.* for his debt and damages aforesaid, and have, &c.

III.

See Lilly's
Ent. 591.

(*a*) *Fi. Fa.* against the bail to warrant a *ca. fa.* after a *sci. fa.* differs only from this form in the following words to be inserted in this place, "by the default of them the said *R. F.* and *J. W.*."

IV.

FIERI FACIAS against BAIL, on a recognizance removed out of C. B. by Certiorari, after judgment affirmed in Error in K. B.

Lil. Ent. 588.

—We command you, that of the goods and chattels of— (defendant and bail, and addi-

additions) the bail of ——— (defendant) in your bailiwick, you cause to be made — *l.* and have that money before us on ——— wheresoever, &c. and to be paid to *Adam B.* according to the form and effect of a certain recognizance by them this said (defendant and bail) to the said *Adam*, for the said (defendant) upon our certain writ of error, in our court before — our chief justice of the bench, at his chambers, situate in *Serjeant's Inn*, in *Chancery-lane*, *London*, acknowledged, as by the record thereof, which we lately for certain reasons, caused to be brought into our court before us at *Westminster*, appears to us on record. And whereon in our said court before us at *Westminster* aforesaid, it is considered, that the said *Adam* may have thereof his execution against the said (defendant and bail) for the said — *l.* by the default of them the said (defendant and bail) as it appears to us on record, and have there this writ. Witness, &c.

V.

FIERI FACIAS *against BAIL, on a judgment in a sci fa. quare executionem non on error in K. B.*

—— We command you, that of the lands and chattels of *Alexander H.* of, &c. one of the

Lil. Ent. 591.

S 2

bail

A P P E N D I X.

bail of *Colen* *C.* being in your bailiwick, you cause to be made 240 *l.*; and of the lands and chattels of *James C.* late of, &c. another of the bail of the said *Colen*, being in your bailiwick, you cause to be made 240 *l.* and have that money before us on — wherefover we shall then be in *Great Britain*, to be paid to *Thomas L.* Esq; according to the form and effect of the adjudication of execution on a certain recognizance by them the said *A.H.* and *J.C.* to the said *Thomas L.* for the said *C.* in our court, before — and his companions, our justices of the bench at *Westminster*, acknowledged, as by the record and proceedings of the said adjudication of execution thereof, which we lately, for certain reasons caused to be brought into our court before us, appears to us on record; and whereof in our same court before us at *Westminster*, it is considered that the said *Thomas L.* may have thereof his execution against the said *A.* and *J.* for the said several sums of 240 *l.* and 240 *l.* in form afore-said, respectively acknowledged to be respectively levied on their lands and chattels, by the default of them the said *A.* and *J.* as it appears likewise to us on record, and have there this writ. Witness, &c.

VI.

FIERI FACIAS on a judgment on a recognizance of BAIL, in C. B. after an affirmation thereof in K. B.

—Greeting, We command you, that of the lands and chattels of *W. T.* of, &c. being in your bailiwick, you cause to be made 100*l.* And of the lands and chattels of *J. B.* of, &c. in your bailiwick, you cause to be made 100*l.* to be paid to *A. F.* according to the form and effect of the adjudication of execution, on a certain recognizance by them the said *W. T.* and *J. B.* to the said *A. F.* in our court, before — and his companions, our justices of the bench at *Westminster*, acknowledged, as by the record and proceedings of the adjudication of execution thereon, which into our court before us at *Westminster*, we lately, for certain causes of error in the same to be corrected, caused to be brought, appears to us on record, and which in our same court before us, being in all things affirmed, now remaining, appears likewise to us on record; and also, 12*l.* which to the same *A. F.* in our same court, according to the form of the statute * in such case made and provided,

* 3 Hen. 7. c. 10.

were adjudged for his costs and charges which he had sustained by reason of the delay of execution of the judgment aforesaid, on pretence of the prosecution of our said writ of error by the said *W. T.* and *J. B.* of, and upon the premisses aforesaid prosecuted, whereof the said *W. T.* and *J. B.* are convicted, as it likewise appears to us on record, and have that money before us on — wheresoever we shall then be in *England*, to be paid to the said *A. F.* for his debt, damages, costs, and charges aforesaid; and have there this writ. Witnesses, &c.

VII.

SCIRE FACIAS, *against BAIL on a recognizance on a writ of error in the Exchequer chamber: in Case.*

Lil. Ent. 644. — Greeting. Whereas *F. T.* of, &c. and *J. W.* of, &c. on the — day of *May*, in — term, in the — year of our reign, came into our court before us at *Westminster* in their proper persons, and according to the form of the statute to prevent unnecessary delays of execution thereof made and provided, acknowledged they owed, and each of them for himself acknowledged he owed to *H. T. Gent.* 20*l.* of lawful, &c.
to]

to be paid to the said *H.* his executors or assigns; and unless they did the same, *E.* and *J.* granted, and each of them for himself granted, the said 202*l.* to be made on their and each of their lands and chattels, and levied to the use of him the said *H.* on the condition following: That whereas the said *H. T.* lately in our court before us at *Westminster*, by bill, without our writ, and by the judgment of the same court, had recovered against *J. J. Gent.* 101*l.* for his damages which he had sustained, as well by reason of a certain trespass on the case to the said *H.* by the said *J. J.* done as for his costs and charges by him about his suit in that behalf expended, whereof the said *J. J.* is convicted, as in our said court before us appears on record. And whereas the said *J. J.* had prosecuted our writ of error upon the judgment aforesaid, returnable before our justices of the common bench and the barons of our *Exchequer* of the degree of the coif in our *Exchequer* chamber on, &c. If therefore the said *J. J.* should prosecute the said writ of error with effect, and if the judgment aforesaid should be affirmed against the said *J. J.* then if the same *J. J.* should satisfy and pay to the said *H. T.* the damages aforesaid, and also all such costs and damages as should be adjudged to the said *H. T.*

by reason of the delay of his execution upon the judgment aforesaid, on the pretence of the prosecution of the said writ of error, then that recognizance should be void and of none effect, or else should remain in its full strength and effect, as by the record thereof in our said court before us at *Westminster* remaining manifestly appears. And whereas also the judgment aforesaid, afterwards, *to wit*, in ——— term last past, in our *Exchequer* chamber aforesaid before the justices and barons aforesaid was duly affirmed, and — *l.* to the same *H. T.* in our same *Exchequer* before the justices and barons aforesaid, according to the form of the statute thereof made and provided, were adjudged for his damages, costs and charges, which he had, by reason of the delay of his execution of the judgment aforesaid, on the pretence of the prosecution of the said writ of error, as by the record and proceedings thereof by the said justices and barons, according to the form of the statute aforesaid from our said *Exchequer* chamber into our said court before us at *Westminster*, remitted, and in our same court before us remaining, manifestly appears. And the said *J. J.* hath neither paid nor satisfied to the said *H. T.* either the damages aforesaid by him the said *H. T.* in our said court before us in form
afore-

aforesaid recovered, nor the said — *l.* to the same *H. T.* in our said *Exchequer* chamber in form aforesaid adjudged, as we have by the suggestion of the said *H.* in our court before us understood. Wherefore the same *H.* hath besought us to grant him his proper remedy in this behalf; and we in this behalf, being willing that what is just should be done, command you, that by good and lawful men of your bailiwick, you give notice to the said *E. T.* and *J. W.* that they be before us at *Westminster* on — to shew, if they have or can say any thing for themselves, why the said 202 *l.* by them in form aforesaid acknowledged, ought not to be made of their lands and chattels, and levied to the use of the said *H. T.* according to the force, form and effect of the recognizance aforesaid, if they shall think fit, and further to do and receive, &c. (as in No. 1.)

VIII.

PLEA to a *Sci. fa.* against BAIL, that he is not the same person.

Garlick and Gantlet.

John Garlick, who is now, on the writ of *Lil. Ent.* 398. *scire facias* aforesaid, summoned, in his proper person, comes and says, that he upon the writ aforesaid is summoned to shew cause accord-

according to the command of the writ aforesaid, and says, that the said *Roger Gantlet*, ought not to have execution against him for the debt, damages, costs, and charges aforesaid, because he says, that a certain other *John* came into the same court here, before—chief justice of the Lord the King assigned to hold pleas before the King himself, at his mansion-house, situate—— and become one of the surety and bail for the said *Thomas Garlick*, in the plea aforesaid; at the suit of the said *Roger Gantlet*, in manner and form as by the writ aforesaid is above supposed; without that, that the same *John* now appearing is the same person who came into the same court here, before —— the chief justice aforesaid, and became one of the surety, and bail for the said *T. G.* in the plea aforesaid, at the suit of the said *R. G.* as by the writ of *sci. fa.* aforesaid, is above supposed, and this the same *John G.* now appearing, is ready to verify, wherefore he prays judgment, &c.

IX.

Plea of a payment of the debt.

Short and another, and Beetham.

Lil.Ent.393.

And the said *Peter* and *Samuel*, in their proper persons come and say, that the said

I

William

William ought not to have his execution against them, the said *P.* and *S.* for the damages aforesaid, because they say, that they, after the recovery of the judgment aforesaid, in the writ of *sci. fa.* aforesaid, above-mentioned, and before the issuing of the said writ of *scire facias*, to wit, on the — day of — in the — year of the reign of the said Lord the now King, paid to the said *William* the said — *l.* in satisfaction and discharge of the judgment aforesaid, to wit, at — in the county aforesaid, which said — *l.* the said *W.* then and there received, and accepted in full satisfaction and discharge of the judgment aforesaid; and this they are ready to verify; wherefore they pray judgment, if the said *W.* ought to have his execution against them for the damages aforesaid, &c.

X.

The entry of the judgment on the recognizance against the Bail.

P L E A S inrolled at Westminster, before — and his companions, justices of the Lord the King, of the bench of — Term, in the — year of the reign — &c, Roll.

Middlesex ss. The sheriff of *Middlesex* Lil. Ent 380.
was commanded, whereas *A. H.* late of —
and

The condi-
tion.

Judgment
against the
principal.

and *J. C.* late of — late in the court of the Lord — late King of *Great Britain*, before the late King himself at *Westminster*, to wit, in — Term, in the — year of the reign of the said Lord the King, before — and his companions justices of the said Lord the King, of the bench here at *Westminster*, acknowledged, and each of them acknowledged they owed to *T. L.* the sum of 240*l.* which said sum of 240*l.* the same *A.* and *J.* for themselves and their heirs, agreed and granted, and each of them for himself and his heirs, did agree and grant, should be raised and levied out of their and each of their lands and chattels, to the use and behoof of the same *T. L.* on this condition, That if it should happen that judgment should be given for the said *T. L.* against *C. C.* late of, &c. in a certain plea of debt on a demand of 120*l.* by the said *T. L.* against the said *C.* in the same court here prosecuted, then the same *C.* the said debt of 120*l.* and also all damages which to the said *T. L.* by reason of the detention of that debt in the same court here should be adjudged, should satisfy, or his body in execution of that judgment, to the prison of the *Fleet* should render: and although the said *T. L.* in *Easter* Term, in the — year of the reign of our Sovereign Lord — now King of *Great Britain*, &c. before the said

said — and his companions, justices of the said Lord the now King of the bench here, to wit, at *Westminster* aforesaid, by the consideration of the same court, had recovered against the said C. as well the said 120 *l.* as — *l.* which to the same *T. L.* in the court of the same Lord the now King were adjudged for his damages which he had by reason of the detention of that debt, whereof he is convicted, as by the same record and proceedings thereof in the same court of the said Lord the now King remaining manifestly appears: nevertheless, the said C. the debt and damages aforesaid to the said *T. L.* hath not satisfied, nor his body in execution of such judgment to the said prison of the *Fleet* hath not rendered as by the suggestion of the said *T. L.* the said Lord the King had understood: And because, &c. that by good, &c. he should give notice to the said *A.* and *J.* that they should be before the said justices of the said Lord the King at *Westminster*, on — to shew if, &c. to wit, to the said *A.* why the said 240 *l.* by him in form aforesaid acknowledged, out of his lands and chattels ought not to be raised; and to the said *J.* why the said 240 *l.* by him in form aforesaid acknowledged out of his lands and chattels ought not to be raised, and to the use and behoof of the same *T. L.* levied according

Breach.

Sci. fa.

Nil returned

Second sci. fa.

Nil returned.

*Judgment by
nil dicit.*

to the form of the recognizance aforesaid, if, &c. and now here at this day, to wit, the said — comes the said *T. L.* by *A. B.* his attorney, and hath offered himself on the fourth day against the said *A.* and *J.* in the plea aforesaid; and they being solemnly called have not come; and the sheriff, to wit, *C. T. Esq;* and *S. S. Esq;* now returns, that they have nothing, nor hath either of them any thing, &c. neither are they found, nor is either of them found, &c.; therefore as before the sheriff is commanded that by good, &c. he give notice to the said *A.* and *J.* that they be here on — to shew in form aforesaid, &c. on which day here comes as well the said *T. L.* by his attorney aforesaid, as the said *A.* and *J.* by *P. Q.* their attorney, and the sheriff, to wit, the said *C. T. Esq;* and *S. S. Esq;* as before, now return that they have nothing, nor hath either of them any thing, neither are they found, nor is either of them found, &c. And upon this the said *T. L.* prays execution against the said *A.* for the said 240 *l.* by him in form aforesaid acknowledged, and against the said *J.* for the said 240 *l.* by him in form aforesaid acknowledged according to the form of the recognizance aforesaid, to be adjudged to him, &c.

And the said *A.* and *J.* by their attorney aforesaid, come and defend the force and injury when, &c. and say nothing in bar or preclusion

preclusion of the execution aforesaid, whereby the same *Thomas* remains against the said *A.* and *J.* therein undefended: Therefore it is considered that the said *T.* have execution against the said *A.* and *J.* of the said several sums of 240 *l.* of their and each of their lands and chattels, respectively to be levied according to the form and effect of the recognizance aforesaid.

XI.

A bond from the defendant to indemnify the bail.

Whereas the above-named *H. B.* at the special instance and request of the above bounden *D. L.* together with him the said *D. L.* and one *S. S.* did, on the day of the date of the above written obligation, become bail for one *J. M.* in a certain action brought against him in the court of *King's Bench* at *Westminster*, by *P. C.* gent. for assaulting, taking, and detaining of *Martba* the wife of the said *P. C.* to his damage of 5000 *l.* and also, for one *R. L.* for an action brought against him in the same court, by the said *P. C.* in the like action: and the said *H. B.* did, together with the said *D. L.* and the said *S. S.* enter into two several recognizances, before—one of his Majesty's justices of the said court of *King's Bench*,
wit's

with conditions, that if they the said *J. M.* and *R. L.* respectively should be condemned in the said several suits, they should respectively pay the condemnation monies, or render their bodies to the prison of the marshal of the *Marshalsea*, or that they the said bail would do the same for them, or to some such or the like purport or effect, as by the said several recognizances now remaining on record in the same court appears. Now the condition of the above-written obligation is such, that if the said *D. L.* his heirs executors, administrators, or assigns, or any of them, do and shall from time to time, and at all times hereafter, save harmless and keep indemnified him the said *H. B.* his heirs, executors, administrators and assigns, and every of them, and his and their goods and chattels, lands and tenements, of, from and against all actions, suits, costs, charges, damages, losses, hindrances, executions, expences and demands whatsoever, which he or they, or any or either of them, shall or may sustain, or be put unto, for, or by reason or means of his the said *H. B.*'s becoming and being bail for the said *J. M.* and *R. L.* or either of them, as aforesaid, or for, or by reason or means of his entring into the said recognizances, or either of them as aforesaid, then, &c.

I N D E X

T O T H E

F I R S T P A R T.

A.

A C T I O N

NOT depending till Bail
filed - - - - -

On *Bail-bond* - - - - -

When Bail below cannot be re-
fused therein, when otherwise

On *recognizance* staid by writ of
error - - - - -

Of pleading principal's death

Is personal, execution thereon

If Bail plead thereto are fixed

Against principal brought by Bail

On replevin bond, com. Bail

A F F I D A V I T

To hold to Bail, positive

For silk under 26 Gec. 2.

Of assignee of a bond

"As he computes it"

Of an executor

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E R R A T A.

Page 1. Line 2. of margin *for* f. 12. *read* 1 & 2

- 7. 5. *for* privilege *read* leave
- 8. 25. *read* offender
- 10. 12. *dele* heirs
- 14. 3. *for* entred *read* filed
- 19. 12. of margin, *read* Sid. 295.
- 21. last line, *dele* -ing and given *read* giving security
- 27. 10. *dele* by
- 33. 25 *read* that
- 40. 4 *read* bail-piece
- 54. 9 of margin, 6 *Mod.*
- 67. 2. put the comma after custody
- 66. last line *read* non-profs
- 74. 2d line from bottom *read* surrender
- 75. 13. of margin *read* 3 Bulst.
- 81. *dele* all first line
- 98. 22. *read* 3 Ja.
- 107. 5. of margin *read* 2501
- 104. 18. *for* plaintiff *read* defendant
- 123. 19. *for* defendant *read* bankrupt
- 166. 4 of margin *put* 40 Ed. &c. *after* Aff. 44. &c.
- 167. 18 of margin *read* 13 Ja. 1.
- 170. 7. of margin *read* 1 Burn 155
- 177. 2. of margin *read* Blackerby
- 179. 6. of margin 246.
- 8. of margin 106
- 182. 10. of margin Glanv. l. 14.
- 183. 10. of margin Abr.
- 14. of margin 336.
- last line of margin Skin.
- 187. 10. of margin *dele* second 3.
- 191. 22. put the comma after jail
- 231. 2. of margin *read* 160.
- 4. of margin *read* Lat.



